HEARINGS RELATING TO H.R. 10175, TO ACCOMPANY H.R. 11363, AMENDING THE INTERNAL SECURITY ACT OF 1950

HEARINGS

BEFORE THE

COMMITTEE ON UN-AMERICAN ACTIVITIES

HOUSE OF REPRESENTATIVES

EIGHTY-SEVENTH CONGRESS

SECOND SESSION

MARCH 15, 1962

INCLUDING INDEX

Printed for the use of the
Committee on Un-American Activities

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1962

COMMITTEE ON UN-AMERICAN ACTIVITIES

United States House of Representatives

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John C. Walsh, *Co-counsel*
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Public Law 601, 79th Congress

The legislation under which the House Committee on Un-American Activities operates is Public Law 601, 79th Congress [1946]; 60 Stat. 812, which provides:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * *

PART 2—RULES OF THE HOUSE OF REPRESENTATIVES

Rule X

SEC. 121. STANDING COMMITTEES

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17. Committee on Un-American Activities, to consist of nine Members.

Rule XI

POWERS AND DUTIES OF COMMITTEES

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(q) (1) Committee on Un-American Activities.

(A) Un-American activities.

(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by such chairman or member.

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Rule XII

LEGISLATIVE OVERSIGHT BY STANDING COMMITTEES

SEC. 136. To assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee; and, for that purpose, shall study all pertinent reports and data submitted to the Congress by the agencies in the executive branch of the Government.

RULES ADOPTED BY THE 87TH CONGRESS

House Resolution 8, January 3, 1961

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RULE X

STANDING COMMITTEES

1. There shall be elected by the House, at the commencement of each Congress

* * * * * * *

(r) Committee on Un-American Activities, to consist of nine Members.

* * * * * * *

RULE XI

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* * * * * * *

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(a) Un-American activities.

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The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

* * * * * * *

27. To assist the House in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the House shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee; and, for that purpose, shall study all pertinent reports and data submitted to the House by the agencies in the executive branch of the Government.

FOREWORD

At the hearings of March 15, 1962, on H.R. 10175, which are fully recorded herein, the views of the interested Departments of Government were received. The Departments appeared to be unanimous in their approval of the purposes of the bill, but as will be noted in the record certain modifications and revisions were suggested.

As a result of the views presented by the Departments of Defense and Justice, it was the thought of the committee that a bill be introduced which would incorporate those revisions requested by the Departments as modified or supplemented by our own thinking. Consequently, I introduced H.R. 11363 on April 17, 1962, and on the following day Mr. Scherer, in support of this proposal, introduced an identical bill, H.R. 11414.

The hearings on H.R. 10175 are therefore directly related to the bills above mentioned, which were subsequently introduced, and form the base for consideration and understanding of them. The Departments of Defense and Justice have now been asked to express their final views with respect to H.R. 11363 and its companion bill, H.R. 11414. Upon receipt of comments by the Departments relating to this new version it is expected that shortly thereafter the committee will make its report to the House.

A copy of H.R. 11363 follows.

FRANCIS E. WALTER,
Chairman, Committee on Un-American Activities.

APRIL 19, 1962.

87TH CONGRESS
2D SESSION

H.R. 11363

IN THE HOUSE OF REPRESENTATIVES

APRIL 17, 1962

Mr. WALTER introduced the following bill; which was referred to the Committee on Un-American Activities

A BILL

To amend the Internal Security Act of 1950 to provide for the protection of classified information released to or within United States industry, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Internal Security Act of 1950 is amended by adding at the end thereof the following new title:

"TITLE III—INDUSTRIAL SECURITY PROGRAM

"REGULATIONS

"SEC. 301. Under such regulations as the President may prescribe, the Secretary of Defense may prescribe such uniform regulations, standards, restrictions, and other safeguards as he considers necessary to protect classified information released to or within any industrial, educational, or research organization, institution, enterprise, or other legal entity, located in the United States, whether or not operated for profit (hereafter in this title referred to as 'United States industry'), including procedures for determining eligibility for authorizations for access to classified information so released. The standard for determining eligibility for authorization for access to classified information pursuant to this title shall be that the granting or continuing of access authorization is clearly consistent with the national interest.

"PERSONAL APPEARANCE PROCEDURES

"SEC. 302. Except in cases where the Secretary personally determines that such procedures cannot be employed consistently with the national security, in which event the Secretary will personally make the determination to deny or revoke access authorization, an authorization for access to classified information by an individual (hereafter in this title referred to as 'applicant'), employed in United States industry whose employment involves access to classified information may not be finally denied or revoked unless the applicant has been given—

"(1) a written statement of reasons for the denial or revocation stated as comprehensively and detailed as the national security will permit;

"(2) an opportunity, after he has replied in writing within a reasonable time under oath or affirmation in specific detail to the statement of reasons, for a personal appearance proceeding at which time he may present evidence in his own behalf:

"(3) a reasonable time to prepare for the proceeding;

"(4) the opportunity to be represented by counsel; and

"(5) a written notice advising him of final action which, if adverse, shall specify whether the Secretary has found for or against him with respect to each allegation in the statement of reasons.

With respect to matters, other than those relating to the characterization in the statement of reasons of any organization or individual other than the applicant, which he controverts in his reply, the applicant shall be given an opportunity to inspect any documentary evidence or cross-examine either orally or through written interrogatories any witness providing adverse information upon which the Secretary may rely in reaching a final determination to deny or revoke the authorization for access to classified information. However, documentary evidence which has been classified, and information supplied by informants may be received and considered without an opportunity for inspection or cross-examination if the applicant is given a summary of such evidence or information which is as comprehensive and detailed as the national security will permit and, in the case of information supplied by an informant, the informant is one—

"(1) who is identified but who cannot be brought forward because of death, serious illness, or for similar cause; or

"(2) who cannot, for reasons determined by the Secretary to be good and sufficient, be either identified or cross-examined; or

"(3) whose identity cannot be revealed, in the judgment of the head of the Department supplying such informant, without substantial harm to the national interest.

Nothing contained in this title shall be deemed to support a demand by an applicant to inspect or have access to the investigative reports of any agency of the Government.

"COMPULSORY PROCESS

"SEC. 303. Under such regulations as the Secretary may prescribe, the Secretary (or his designee for such purpose) shall have power to issue, and in his discretion for good cause shown, shall issue, process to compel witnesses to appear and testify or produce evidence in a personal appearance proceeding under section 302. Any process so issued may run to any part of the United States and its possessions, including the District of Columbia and the Commonwealth of Puerto Rico. Any person who willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify or produce evidence in obedience to any process duly issued under this section, shall be fined not more than $500, or imprisoned not more than six months, or both. Upon certification by the Secretary, concerning any such neglect, refusal, or failure by any person, to the United States attorney for any judicial district in which such person resides or is found, the United States attorney shall proceed by information for the prosecution of such person. The Secretary (or his designee for such pur-

pose), upon good cause shown, may (1) authorize any party to a personal appearance proceeding under section 302 to obtain the testimony of any person by deposition upon oral examination or by written interrogations, and (2) appoint any person to obtain such testimany. Any person so appointed shall have the power to administer oaths.

"FEES AND EXPENSES FOR TAKING EVIDENCE

"SEC. 304. The fees and expenses of witnesses subpenaed or called by or on behalf of the applicant shall be borne by the applicant, excepting that the Secretary may, in accordance with such regulations as he shall prescribe, provide that such fees and expenses shall, under certain equitable circumstances and in the interests of justice, be borne in whole or in part by the United States. Witnesses summoned or called to testify or produce evidence at a personal appearance proceeding are authorized travel expenses and per diem in such amounts as provided by the Standardized Government Travel Regulations or the Joint Travel Regulations, as appropriate. A witness whose deposition is taken, and the person taking his deposition, is entitled to the same fees that are paid for like services in the courts of the United States. Any appropriation otherwise available to the agency concerned for procurement shall be available for such expenses.

"REIMBURSEMENT FOR LOSS OF CERTAIN EARNINGS

"SEC. 305. The Secretary may, in accordance with such regulations as he may prescribe, provide for the reimbursement of all or any part of a net loss of earnings resulting directly from the suspension, denial, or revocation of an authorization for access to classified information of an applicant, who, at the time of such suspension, denial, or revocation, was employed in United States industry if, at a later time, it has been determined by the Secretary that (1) the applicant is eligible for an access authorization equivalent to that which was suspended, denied, or revoked, and (2) after considering all of the facts and circumstances under which the suspension, denial, or revocation occurred, it is fair and equitable that the United States, rather than the applicant, bear the loss for which reimbursement is to be made. Reimbursement may not exceed the difference between the amount the applicant would have earned as an employee of the same employer had he continued in the same position as that held at the time of suspension, denial, or revocation and his interim earnings during the period commencing on the date of suspension, denial, or revocation and ending with the date of giving notice to the applicant by regular first-class mail addressed to his last known address of his eligibility for access authorization. The authority conferred by this section may be exercised whether the suspension, denial, or revocation of access authorization directly causing the loss of earnings, or the subsequent determination of eligibility, occurred before or after the date of enactment of this title. Any appropriation otherwise available to the agency concerned for procurement shall be available for such reimbursements.

"EXTENSION OF PROGRAM BY AGREEMENT

"SEC. 306. By agreement between the Department of Defense and any other department or agency of the United States, regulations prescribed by the Secretary of Defense under this title may be extended to apply to releases to or within United States industry of classified information which the other department or agency has the responsibility for safeguarding. In such cases, however, any reimbursement authorized by section 305 of this title shall be made by the department or agency concerned.

"NONAPPLICATION OF ADMINISTRATIVE PROCEDURE ACT

"SEC. 307. The Administrative Procedure Act, as amended (5 U.S.C. 1001 et seq.) shall not apply to the use or exercise of any authority granted by this title.

"DEFINITION OF CLASSIFIED INFORMATION

"SEC. 308. For the purposes of this title the term 'classified information' means information which, for reasons of national security, is specifically designated by a United States Government agency for limited or restricted dissemination or distribution."

HEARINGS RELATING TO H.R. 10175, TO ACCOMPANY H.R. 11363, AMENDING THE INTERNAL SECURITY ACT OF 1950

THURSDAY, MARCH 15, 1962

UNITED STATES HOUSE OF REPRESENTATIVES,
COMMITTEE ON UN-AMERICAN ACTIVITIES,
Washington, D.C.

PUBLIC HEARINGS

The Committee on Un-American Activities met, pursuant to call, at 10:15 a.m., in Room 445 of the House Office Building, Washington, D.C., Hon. Francis E. Walter (chairman of the committee) presiding.

Committee members present: Representatives Francis E. Walter, of Pennsylvania; Clyde Doyle, of California; William M. Tuck, of Virginia; Gordon H. Scherer, of Ohio; August E. Johansen, of Michigan; and Henry C. Schadeberg, of Wisconsin.

Staff members present: Frank S. Tavenner, Jr., director; Alfred M. Nittle, counsel; John C. Walsh, co-counsel; and George H. Lynch, consultant.

The CHAIRMAN. I apologize for being late. I was detained this morning, trying to get the immigration bill out of committee.

We meet today for the consideration of H.R. 10175. The purpose of this bill is to create a legislative base authorizing the Secretary of Defense to establish a security program with respect to defense contractors and their employees, and to prescribe procedures to be followed in evaluating industrial security cases, so that the preservation and integrity of classified information may be assured.

That a program of this nature is undoubtedly necessary would seem to be self-evident. Our defense efforts have long been the target of planned espionage and sabotage. In numerous hearings over the years, this committee has established that the Communist Party of the United States has, for purposes of sabotage and espionage, deliberately infiltrated basic industry which is involved in defense production of highly classified projects of the military establishments.

For example, Mr. John Lautner, who held high Communist Party office on the national level and was an active Communist Party member for more than 20 years prior to his expulsion from the party in 1950, testified that, as far back as 1932, the Communist Party embarked upon a program called "Face to the Shop," which was designed to infiltrate and colonize basic industry with Communists.

He traced the development of that program and testified that in 1948 the organizational director of the Communist Party, in a secret report, was able to boast that over 3,000 Communist Party branches throughout the country and between 400 and 500 industrial branches

had been established. (See: "Investigation of Communist Infiltration and Propaganda Activities in Basic Industry, Gary, Ind., Area," hearings held February 10 and 11, 1958.) It may be taken as factual that the Communists have succeeded in serious degree in accomplishing their planned infiltration of basic industry. (See also: "Problems of Security in Industrial Establishments Holding Defense Contracts, Greater Pittsburgh Area, Part 2," hearings held March 11, 1959.)

More recently the investigations of this committee into the National Security Agency, arising out of the defection of William H. Martin and Bernon F. Mitchell to the Soviet Union July 1960, have pointed up additional security problems of a general nature and other than those related directly to disloyalty, including such considerations as perversion, personality and character defects, and habits that render individuals untrustworthy and unreliable as repositories of classified information or State secrets.

The general necessity for a security program cannot be disputed. Moreover, the legal necessity for specific congressional action to authorize such a program on a firm basis is suggested. This committee has repeatedly and urgently recommended a legislative program of this type. Although the Executive Branch of the Government has been aware of the serious danger to national security by reason of Communist infiltration of industry holding defense contracts, as well as other security problems above indicated, the industrial clearance or security program which had been for several years established in the Defense Department under regulations of the Secretary of the Defense, was struck down by the recent decision of the Supreme Court in the case of *Greene* v. *McElroy*, 360 U.S. 474, decided June 29, 1959. The regulations of the Secretary of Defense then in effect, and which provided for a personnel security clearance program granting fair but limited hearings to persons denied access to classified information, were held invalid by the Supreme Court.

The Supreme Court declared that such regulations issued under the authority of the Secretary of Defense had not sufficient authorization and that "it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use."

The Chief Justice went further and declared, at page 508:

> Whether those procedures under the circumstances comport with the Constitution we do not decide. Nor do we decide whether the President has inherent authority to create such a program, whether congressional action is necessary, or what the limits on executive or legislative authority may be. We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.

Perhaps I should point out that immediately after this decision in the Greene case, I introduced on July 7, 1959, H.R. 8121, with a view toward establishing congressional authority for the issuance by the Secretary of Defense of such regulations. That bill was reported out by this committee on September 2, 1959, passed by the House on February 2, 1960, and referred to the Senate, which took no final action. Further, the President on February 20, 1960, issued Execu-

tive Order No. 10865, giving authority to certain departments, including the Department of Defense, to issue regulations and prescribe requirements for the safeguarding of classified information within industry. The necessity for such regulations was thus clearly and explicitly recognized by the President.

However, congressional action likewise seems desirable in order to clarify any ambiguity as to the necessity for congressional action posed in the foregoing language of Chief Justice Warren which I have quoted. With these thoughts in mind, we now proceed to a consideration of the bill, H.R. 10175, and the views of the Executive departments in relation thereto.

(H.R. 10175 follows:)

[H.R. 10175, 87th Cong., 2d sess.]

A BILL To amend the Subversive Activities Control Act of 1950 to provide for a security program with respect to defense contractors and their employees

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Subversive Activities Control Act of 1950 (64 Stat. 987) is amended by inserting immediately after section 5 the following new section:

"INDUSTRIAL PERSONNEL SECURITY REVIEW

"SEC. 5A. (a) The Secretary of Defense (hereafter in this section referred to as the 'Secretary') is authorized, in connection with the performance of any contract with a military department involving classified information, to prescribe such requirements, restrictions, and safeguards, with respect to access to such information, as he may deem necessary in the interest of national security.

"(b) In any case in which access to classified information by (1) any person who has a contract referred to in subsection (a) of this section, (2) any person who has a subcontract of any such contract, or (3) any employee of any such person, is denied, suspended, or revoked under the regulations referred to in such subsection (a), the Secretary shall provide for a personal appearance proceeding at which the person aggrieved by the denial, suspension, or revocation of his access to classified information shall be permitted to present evidence in his behalf and at which the United States shall produce those persons who furnished information forming the basis of any such denial, suspension, or revocation, to the extent that the Secretary, and the head of the investigative agency (if any) which supplied the information, shall determine to be permissible in the interest of national security.

"(c) Under such regulations as the Secretary may prescribe, the Secretary (or his designee for such purpose) shall have the power to issue process to compel witnesses to appear and testify or produce evidence in a personal appearance proceeding under subsection (b) of this section. Any process so issued may run to any part of the United States and its possessions, including the District of Columbia and the Commonwealth of Puerto Rico. Any person who willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify or produce evidence in obedience to any process duly issued under this subsection, shall be fined not more than $500, or imprisoned not more than six months, or both. Upon certification by the Secretary, concerning any such neglect, refusal, or failure by any person, to the United States attorney for any judicial district in which such person resides or is found, the United States attorney shall proceed by information for the prosecution of such person. The Secretary (or his designee for such purpose) may (1) authorize any party to a personal appearance proceeding under subsection (b) of this section to obtain the testimony of any person by deposition upon oral examination or by written interrogations, and (2) appoint any person to obtain such testimony. Any person so appointed shall have the power to administer oaths.

"(d) Witnesses summoned to a personal appearance proceeding under subsection (b) of this section shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken, and the person taking their deposition, shall be entitled to the same fees as are paid for like services in the courts of the United States.

"(e) Under such regulations as the Secretary may prescribe, any individual referred to in clause (3) of subsection (b) of this section may be reimbursed for any loss of earnings directly resulting from a denial, suspension, or revocation of his access to classified information, if the Secretary, or his designee, determines that such denial, suspension, or revocation was unjustified and that under all the circumstances reimbursement would be just and equitable. Reimbursement may be made for all or part of the period of such denial, suspension, or revocation, in an amount not more than the difference between the amount such individual would have earned as an employee of the contractor or subcontractor concerned at the rate he was receiving on the day of such denial, suspension, or revocation, and the amount of his interim earnings.

"(f) For the purposes of this section the term 'classified information' means information which, for reasons of national security, is specifically designated by a United States Government agency for limited or restricted dissemination or distribution."

The CHAIRMAN. Mr. Tavenner, will you call your witness?

Mr. TAVENNER. Mr. Chairman, I think possibly first we should introduce a letter from the Department of Defense, dated March 14, 1962, which is in reply to your request for the views of the Department, together with the enclosed copy of a proposed substitute bill.

The CHAIRMAN. That will be made a part of the record at this point.

(The documents referred to follow:)

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D.C., March 14, 1962.

DEAR MR. CHAIRMAN:

You requested the Department of Defense to comment upon H.R. 10175, 87th Congress, a bill "To amend the Subversive Activities Control Act of 1950 to provide for a security program with respect to defense contractors and their employees."

In view of the action of the President in Executive Order 10865, the proposed legislation is not considered necessary. However, if the Congress considers that this legislation is desirable, the Department of Defense would have no objection to its enactment.

H.R. 10175 would amend the Subversive Activities Control Act of 1950, as amended (50 U.S.C. 781 et seq.), by inserting immediately after section 5 thereof a new section 5A, entitled "Industrial Personnel Security Review". It would provide legislative authority for the Secretary of Defense to prescribe appropriate safeguards for the protection of classified information in the hands of any contractor, subcontractor, or employee of any contractor or subcontractor, in connection with the performance of any contract with a military department. It would provide a legislative basis whereby an individual whose access authorization had been suspended, denied or revoked would be entitled to a personal appearance proceeding at which, subject to certain limitations, he would be afforded opportunity for cross-examination of persons who had furnished adverse information against him; it would provide the Secretary of Defense with authority to subpoena and to obtain testimony by oral deposition or written interrogatories; it would provide for the payment of certain fees to witnesses; and it would provide authority for reimbursement under certain circumstances for loss of earnings directly resulting from a denial, suspension, or revocation of an authorization for access to classified information.

We appreciate the effort of the Congress to strengthen our security program and we are in accord with the purposes of H.R. 10175 and its principles. It is believed, however, that certain modifications should be made in the bill in the light of experience gained in the operation of the program and Executive Order 10865, February 20, 1960 as amended by Executive Order 10909, January 17, 1961.

Knowing the desire of the Committee to enact legislation which will assure the continuance of a strong industrial security program, there is submitted for consideration a revised draft of legislation which reflects the views of the Department of Defense.

This redraft is designed to extend the scope of the bill to cover Defense Department relations with industry, educational and research organizations and other activities; and to provide express legislative authorization by the Congress

concerning the policies and procedures to be followed in evaluating and adjudicating individual industrial security cases.

The enclosed proposed substitute bill would make the following major modifications to H.R. 10175:

a. It would amend the Internal Security Act of 1950 by adding a new Title, entitled "Industrial Security Program", rather than amend the Subversive Activities Control Act of 1950. The Committee is aware that it is necessary to protect classified information from willful and inadvertent disclosure resulting from activities of those persons who are not motivated by subversion. It is necessary also to guard against persons who may be susceptible to persuasion, coercion, pressure or blackmail because of character weaknesses or unfavorable past associations and activities. Consequently, inasmuch as the industrial security program covers more than the area of subversive activities, we believe the proposed legislation should reflect this breadth of scope.

b. Although both H.R. 10175 and the enclosed redraft are directed in major portion to the policies and procedures governing adjudication of applicant cases, we believe that this draft bill should provide express Congressional authority for all phases of an industrial security program, including the receipt, handling, use, dissemination, storage, transmission, protection and destruction of classified information, and not be limited solely to adjudication of applicant cases.

c. The revised draft of the bill would cover not only situations where a contract involving classified information exists but several other areas where classified information is released to non-governmental activities. This proposal is designed to cover in broad terms both pre-contract and post-contract activities, as well as performance; special situations in the field of research and development; and relations with educational and research organizations and non-profit groups and organizations.

d. The revised draft of the bill would also permit the Department of Defense to continue its program of protecting foreign classified information entrusted to the United States and released to United States industry in furtherance of international defense efforts. This includes the exchange of classified information under NATO and various bilateral agreements between the United States and other countries.

e. The draft bill sets forth Congressional approval for policies under which opportunities for cross-examination of witnesses are now afforded. Of principal importance are the specific provisions for receipt and consideration of information provided by informants who cannot, for stated reasons, be brought forward for cross-examination and the exact circumstances under which opportunities for cross-examination may be denied. In this report, it is important to note the following language of the Supreme Court in the case of *Greene* v. *McElroy* (360 U.S.C. 474, (1959)): "Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their constitutional powers specifically have decided that the imposed procedures are necessary and warranted and have authorized their use."

f. The Committee will note that the proposed draft bill does not contain a grant of subpoena authority to the Secretary of Defense for use in connection with the industrial security program. Experience gained under Executive Order 10865, as amended, has demonstrated that with the necessary amount of effort, expenditure of time, together with the splendid cooperation on the part of other Government agencies, we have been able to obtain the necessary witnesses and evidence in order to support all but an extremely small minority of cases. Accordingly, we do not now seek such subpoena authority but should future experience demonstrate that our need for it is greater than we now think, we will so advise the Committee.

g. The changes contained in the revised draft bill concerning reimbursement for lost earnings are intended to establish firmly that reimbursement under the Industrial Security Program is a matter resting solely in the discretion of the Secretary and is not a legal right of the applicant.

h. By agreement between the Secretary of Defense and the heads of certain departments and agencies, arrangements have been made to apply the Department of Defense Industrial Security Program to operations of the National Aeronautics and Space Administration, the Federal Aviation Agency, the Gen-

eral Services Administration, the Department of State and the Department of Commerce. A new section has been included in the draft bill to provide Congressional approval for the continuance of this activity and for extension to cover other agencies.

The Bureau of the Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

(Signed) CYRUS R. VANCE.

Inclosure: Draft bill.

Honorable FRANCIS E. WALTER,
Chairman, Committee on Un-American Activities,
House of Representatives.

PROPOSED SUBSTITUTE BILL

A BILL To amend the Internal Security Act of 1950 to provide for the protection of classified information released to or within United States industry and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Internal Security Act of 1950 (50 U.S.C. 781 et seq.) is amended by adding at the end thereof the following new title:

"TITLE III—INDUSTRIAL SECURITY PROGRAM

"SEC. 301. Under such regulations as the President may prescribe, the Secretary of Defense may prescribe such uniform regulations, standards, restrictions, and other safeguards as he considers necessary to protect classified information released to or within any industrial, educational, or research organization, institution, enterprise, or other legal entity, located in the United States, whether or not operated for profit (hereinafter referred to as "United States industry"), including procedures for determining eligibility for authorizations for access to classified information so released.

"SEC. 302. Except in cases where the Secretary personally determines that such procedures cannot be employed consistently with the national security, in which event the Secretary will personally make the determination to deny or revoke access authorization, an authorization for access to classified information by an individual (hereinafter referred to as "applicant"), employed in United States industry whose employment involves access to classified information may not be finally denied or revoked unless the applicant has been given—

"(1) a written statement of reasons for the denial or revocation stated as comprehensively and detailed as the national security will permit;

"(2) an opportunity, after he has replied in writing within a reasonable time under oath or affirmation in specific detail to the statement of reasons, for a personal appearance proceeding at which time he may present evidence in his own behalf;

"(3) a reasonable time to prepare for the proceeding;

"(4) the opportunity to be represented by counsel; and

"(5) a written notice by or in behalf of the Secretary advising him of final action which, if adverse, shall specify whether the Secretary has found for or against him with respect to each allegation in the statement of reasons.

With respect to matters not relating to the characterization in the statement of reasons of any organization or individual other than the applicant, and which he controverts in his reply, the applicant shall be given an opportunity to inspect any documentary evidence or cross examine either orally or through written interrogatories any witness providing adverse information upon which the Secretary may rely in reaching a final determination to deny or revoke the authorization for access to classified information. However, documentary evidence which has been classified, and information supplied by informants may be received and considered without an opportunity for inspection or cross examination if the applicant is given a summary of such evidence or information which is as comprehensive and detailed as the national security will permit and, in the case of information supplied by an informant, the informant is one—

"(1) who is identified but who cannot be brought forward because of death, serious illness, or for similar cause; or

"(2) who cannot, for reasons determined by the Secretary to be good and sufficient, be either identified or cross examined; or

"(3) whose identity cannot be revealed, in the judgment of the head of the investigative agency supplying such informant, without substantial harm to the national interest.

However, the applicant may not inspect or have access to the investigative reports of any agency of the Government. The Administrative Procedure Act, as amended (5 U.S.C. 1001 et seq.), does not apply to personal appearance proceedings conducted under regulations prescribed under this Title.

"SEC. 303. Whenever a person is called at the request of the Secretary to testify or produce evidence at a personal appearance proceeding under this Title, travel expenses and per diem are authorized as provided by the Standardized Government Travel Regulations or the Joint Travel Regulations, as appropriate. A witness whose deposition is taken, and the person taking his deposition, is entitled to the same fees that are paid for like services in the courts of the United States. Any appropriation otherwise available to the agency concerned for procurement shall be available for such expenses.

"SEC. 304. The Secretary may, in accordance with such regulations as he may prescribe, provide for the reimbursement of all or any part of a net loss of earnings resulting directly from the suspension, denial, or revocation of an authorization for access to classified information of an applicant, who, at the time of such suspension, denial, or revocation, was employed in United States industry if, at a later time, it has been determined by the Secretary that (1) the applicant is eligible for an access authorization equivalent to that which was suspended, denied, or revoked, and (2) after considering all of the facts and circumstances under which the suspension, denial, or revocation occurred, it is fair and equitable that the United States, rather than the applicant, bear the loss for which reimbursement is to be made. Reimbursement may not exceed the difference between the amount the applicant would have earned as an employee of the same employer had he continued in the same position as that held at the time of suspension, denial, or revocation and his interim earnings during the period commencing on the date of suspension, denial, or revocation and ending with the date of giving notice to the applicant by regular first class mail addressed to his last known address of his eligibility for access authorization. The authority conferred by this section may be exercised whether the suspension, denial, or revocation of access authorization directly causing the loss of earnings, or the subsequent determination of eligibility, occurred before or after the date of enactment of this Title. Any appropriation otherwise available to the agency concerned for procurement shall be available for such reimbursements.

"SEC. 305. By agreement between the Department of Defense and any other department or agency of the United States, regulations prescribed by the Secretary of Defense under this Title may be extended to apply to protect releases to or within United States industry of classified information which the other department or agency has the responsibility for safeguarding. In such cases, however, any reimbursement authorized by section 304 of this Title shall be made by the department or agency concerned."

STATEMENT OF WALTER T. SKALLERUP, JR., DEPUTY ASSISTANT SECRETARY OF DEFENSE (SECURITY POLICY), DEFENSE DEPARTMENT, ACCOMPANIED BY FRANK A. BARTIMO, ASSISTANT GENERAL COUNSEL (MANPOWER); GEORGE MacCLAIN, LEGAL ADVISER AND SPECIAL ASSISTANT TO THE DIRECTOR, OFFICE OF INDUSTRIAL PERSONNEL ACCESS AUTHORIZATION REVIEW, DEFENSE DEPARTMENT; AND HERBERT LEWIS, DIRECTOR, INDUSTRIAL PERSONNEL ACCESS AUTHORIZATION REVIEW DIVISION, DEPARTMENT OF DEFENSE

Mr. TAVENNER. Now, will Mr. Walter T. Skallerup, Jr., who is, I believe, Deputy Assistant Secretary of the Defense Department, come forward, please?

I believe counsel accompanying you is Mr. Frank Bartimo?

Mr. SKALLERUP. Yes, sir.

Mr. TAVENNER. And Mr. MacClain. Will you introduce the other members of your group who are present?

Mr. SKALLERUP. Yes, Mr. Herbert Lewis, who is director of Industrial Personnel Access Authorization Review Division.

Mr. TAVENNER. Now, Mr. Nittle, will you conduct the examination, please?

Mr. NITTLE. Mr. Skallerup, for the purpose of the record, will you kindly state your name in full, your official capacity, and the agency whose views you are authorized to present here today?

Mr. SKALLERUP. My name is Walter T. Skallerup, Jr. I occupy the office of Deputy Assistant Secretary of Defense for Security Policy. I am here today to present the views of the Department of Defense with respect to H.R. 10175, and these views reflect the views of the three services, as well as the Department of Defense.

Mr. NITTLE. Do you have a statement to communicate in response to the committee's request for the views of your Department?

Mr. SKALLERUP. Yes, I have, Mr. Nittle.

Mr. NITTLE. Would you kindly proceed to give that statement?

Mr. SKALLERUP. Mr. Chairman and Members of the Committee, I appreciate this opportunity to appear before the House Committee on Un-American Activities to discuss H.R. 10175 and to review the Department of Defense considerations which have led to the submission of a redraft of the bill.

We appreciate the efforts of the committee to strengthen our security program and are in accord with the purposes of H.R. 10175 and its principles. It is believed, however, that certain modifications should be made in the light of experience gained in the operation of the industrial security program and Executive Order 10865,[1] February 20, 1960, as amended by Executive Order 10909,[1] January 17, 1961.

Two important considerations stand out above all others; one is the case of *Greene* v. *McElroy*, 360 U.S. 474 (1959), and the other is information based upon actual experience in the conduct of the industrial security program.

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[1] Executive Orders Nos. 10865 and 10909 marked "Exhibits Nos. 1 and 2," respectively. See appendix, pp. 519 and 523.

In Greene, the Court said:

Thus, even in the absence of specific delegation, we have no difficulty in finding, as we do, that the Department of Defense has been authorized to fashion and apply an industrial clearance program which affords affected persons the safeguards of confrontation and cross-examination. * * * Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use.

The CHAIRMAN. Don't you feel, Mr. Secretary, that that was an invitation to this committee, or the appropriate congressional committee, to legislate?

Mr. SKALLERUP. I agree, sir.

As a result of the Greene decision, questions were raised with respect to that portion of the industrial security program dependent upon the issuance of Statements of Reasons and the conduct of personal appearance proceedings. Although in our view the Greene case did not decide any constitutional question, it showed that express authorization from the President or the Congress was necessary if the Department of Defense was to be empowered to reach final determinations in the absence of full opportunity for cross-examination.

The Court indicated that it would closely scrutinize any limitation that might be expressly authorized. It was in this context and in the equally serious and compelling context of establishing a realistic means of reaching finality in such cases that Executive Order 10865 was drawn. By setting forth conditions that must be fulfilled, this Order expressly authorized specific limitation on cross-examination and placed the ultimate responsibility for using this authority at the level of the heads of departments in the Executive Branch.

Inasmuch as the industrial security program also is drawn to protect classified defense information from willful and inadvertent disclosure by persons not motivated by subversion, and from persons who may be susceptible to persuasion, coercion, pressure, or blackmail because of weaknesses in character, associations, or activities, we believe the proposed legislation should cover more than the area of subversive activities alone and, therefore, recommend this proposed bill as a new title to the Internal Security Act of 1950, rather than as an amendment to the Subversive Activities Control Act of 1950.

Over the years the extent of classified operations outside governmental activities has expanded significantly. They cover not only industries, large and small, but also educational and research institutions and various nonprofit activities. On occasion individuals are dealt with as contractors. The term "United States industry" is used in the draft bill in the broad sense, covering all nongovernmental activities outside the Department of Defense. These activities also include, for example, activities carried on outside of the United States by the employees or other representatives of corporations owned by United States citizens having their principal place of business located within the United States. The definition in section 301 is intended to provide this coverage.

Before commenting on the sections of this proposed bill, I would like to review the factual background of our industrial security program based upon actual experience and, particularly, that informa-

tion which shows the impact of the industrial security program and the review program upon the work force employed in United States industry. I would hope that this factual discussion would promote a public understanding of our program and would help place these security matters in a sound perspective.

The United States work force engaged in the manufacture of durable and nondurable goods early in 1962 is reported to number 16,400,000 people.

Mr. TAVENNER. Mr. Chairman, excuse me a minute, will you pardon my interruption?

Mr. SKALLERUP. Go right ahead, Mr. Tavenner.

Mr. TAVENNER. May I call this to your attention? The letter of March 14, 1962, which was presented and which has been introduced in evidence, has not been read to the members of the committee, so it is quite possible that the committee members would not readily understand just which bill you are referring to. In order to clarify the matter, I would like to ask you whether or not your comments relate to what you consider an improvement on the present bill, and when you are speaking of "proposed bill," you are speaking of the Defense Department proposed draft bill that you are presenting here this morning. Is that correct?

Mr. SKALLERUP. Mr. Tavenner, and Mr. Chairman and Members of the Committee, my remarks are addressed to the proposed draft bill, so that when I cite sections like this recent citation of section 301, it refers to the proposed draft bill.

The CHAIRMAN. That you are offering?

Mr. SKALLERUP. That we are offering, yes, sir. In general, of course, these remarks have a direct bearing on H.R. 10175.

The CHAIRMAN. Yes.

Mr. SKALLERUP. This was done for purposes of simplicity. We thought it would be simpler to proceed in this manner.

Mr. TAVENNER. Pardon the interruption, if you will begin your paragraph over again, please.

Mr. SKALLERUP. The United States work force engaged in the manufacture of durable and nondurable goods early in 1962 is estimated to number 16,400,000 people. This is roughly one-fourth of the total United States work force. Our estimate of the cumulative total number of access authorizations granted in industry since 1949 is 5,000,000. The total cumulative number of cases which have come under the Department of Defense industrial review program since 1953 is about 4,600 cases.

The language of both the Executive Order and the proposed legislation is in sufficiently broad and general terms to cover the entire industrial security program, both in its granting aspects (the 5,000,000) and its review aspects (the 4,600).

In looking over the 4,600 review cases since 1953, of which a little over 800 have come under the current program which began August 1, 1960, after the Greene case, it appears that a high percentage of persons receiving a Statement of Reasons (SOR) defaulted by not replying to the Statement of Reasons. Defaults occur in over 30 percent of the cases where a Statement of Reasons has been issued.

Between April 1955 and March 1962, it appears that the preponderant majority of grants in the review program have been made by the

Screening Board. The Screening Board accounts for about 85 percent of all grants. Nevertheless this number accounted for an average of only 35 percent of all cases sent to the Screening Board, including the still pending cases.

Only a minority of all cases received into the review program ever reach the personal appearance proceeding stage, namely, about 20 percent. Of those cases which do reach the personal appearance proceeding stage, there are more denials and revocations than grants, with an average of about 42 percent grants and 58 percent denials and revocations.

Since 1960 under the present program a higher percentage of applicants have defaulted by failing to reply to the SOR. Percentages have increased from 30 percent to 33.2 percent, and the percentage of denials and revocations by the Central Board has increased from 54.7 percent to 61.2 percent.

A review of cases under the present 1960 program also discloses the remarkable fact that out of a total of about 800 cases which have come under the review program, of which 500 have been completed and 300 are pending, there are only 11—and the number eventually may be less than 11—in which there is need for use of a certificate to limit opportunity for cross-examination. In all other instances sufficient information has been obtained to go forward with the case and provide an opportunity for cross-examination with respect to those allegations which were in controversy.

Therefore, I would conclude that by dint of hard work and the splendid cooperation of other agencies and departments in the Executive Branch of the Government, the Department of Defense industrial security review program has been able to operate effectively within the traditional legal framework, and that only in a very small number of cases is a resort to exceptional procedures apt to be necessary. In short, our procedures and practices have recognized the interests of individuals and have established safeguards to protect these interests.

Sections 301, 302 of the draft revised bill would provide express legislative authority for the establishment of standardized procedures for the industrial security program, including the review program. These sections would not impair the authority of the Secretary of Defense under regulations prescribed by the President to dispense with such procedures when he decides that the national security so requires in the particular case and when, thereupon, he makes the decision on eligibility in the case.

Mr. SCHERER. Pardon me just at that point. Your draft bill, then, doesn't have any sections which would allow the elimination of cross-examination?

Mr. SKALLERUP. There are sections in it, sir, which would permit the elimination of cross-examination.

Mr. SCHERER. Maybe I didn't follow you, but I understood, from what you just said, that it would eliminate such language.

Mr. SKALLERUP. Well, my purpose in reviewing the experience under the program was, first, to demonstrate that really it is only in a very small minority of cases that people cannot be confronted with witnesses and be given the opportunity to cross-examine them.

The second point is that in the legislation which we are proposing, authority would be granted to the Secretary of Defense under regula-

tions prescribed by the President in individual and particular cases——

Mr. SCHERER. Not to require cross-examination?

Mr. SKALLERUP. Not to require cross-examination.

Mr. SCHERER. That is in this bill that you propose?

Mr. SKALLERUP. Yes, it is, and Mr. Bartimo, assistant general counsel, would like to comment on this point.

Mr. BARTIMO. May I, in answer to your question, Mr. Scherer, pin that point home? Section 302 of the draft bill reads as follows:

> Except in cases where the Secretary personally determines that such procedures cannot be employed consistently with the national security, in which event the Secretary will personally make the determination to deny or revoke access authorization.

This language is designed to take care of the point which you are making; that is the exceptional case. Because of national security interests, the Secretary of Defense may not decide to go ahead with these procedures. The cross-examination procedures may not be employed, and on his own determination the Secretary of Defense may make the decision to deny this particular individual the privilege of access to our classified information.

Mr. SCHERER. I understand.

Mr. SKALLERUP. I am coming to that point in this following paragraph.

Section 302 contains an express legislative authorization whereby the Secretary of Defense, under such regulations as the President may prescribe, may limit the opportunity for cross-examination.

The CHAIRMAN. May I interrupt at that point?

Mr. SKALLERUP. Yes, Mr. Chairman.

The CHAIRMAN. Wouldn't it be preferable to spell out the type of cases, rather than to have the President issue regulations? Why wouldn't it be better to take this entirely away from the field of regulations and write a statute to cover it?

Mr. SKALLERUP. Well, the thought here is that this would provide legislative authority to achieve these results. The President through his Executive Order, and particularly in section 9 of the Executive Order, has granted this authority.

Mr. SCHERER. Well, what the chairman means, is that you would eliminate the necessity for regulation, because we would spell it out in the statute.

The CHAIRMAN. You see, this provides express legislative authorization for regulations to be issued by the President. Now why isn't it better to spell out the regulations fully by statute?

Mr. BARTIMO. Mr. Chairman, I think you are raising a very good point and one which we have discussed extensively, both in the Department of Defense and with our colleagues in the Department of Justice, and I think the problem comes about, sir, in trying to spell out specific criteria in statute which would cover that area.

It is most difficult to do and, therefore, we would urge and recommend that the Congress, that this committee, set forth guidelines, and leave the flexibility in the Executive Branch to go which way it deems best in the national interest.

Mr. SCHERER. Well, you would have to spell it out in your Executive Order, wouldn't you?

Mr. BARTIMO. It is true, sir.

Mr. SCHERER. You mean you could change the Executive Order, from time to time, to meet specific instances?

Mr. BARTIMO. Precisely.

Mr. SCHERER. How would that affect future cases before the Supreme Court? Wouldn't you be in better shape in doing what the chairman suggests by spelling it out in the law, rather than leaving it to regulation?

The CHAIRMAN. Having in mind the decision in the Greene case.

Mr. BARTIMO. I believe, sir, that if this committee sets forth clearly both in its legislative history and the broad language of the statute that which you have in mind, the Secretary of Defense has the authority to implement your guidelines, with specific language. In such a case I am sure that the courts would determine that he is operating under authority given to him by the Congress.

Mr. SCHERER. You think that would meet the requirements in the Greene case? I know it isn't part of the decision, but it is obiter in the Greene case, isn't it?

The CHAIRMAN. I think the obiter dictum very definitely indicates the danger that we are confronted with in permitting the administrative finding to prevail.

Mr. BARTIMO. I would agree, sir, with your statement, that the dicta, or the obiter dictum as you put it, does give us an indication of the thinking of the Supreme Court. In our judgment, the Supreme Court is in effect, in a statesmanlike manner, pointing out to us the deficiencies in our procedures pre-Greene.

We believe that, with the revised draft of the bill which we are recommending to you for consideration, the guidelines and the specific criteria set forth will be sufficiently clear to indicate the will of this committee and the Congress, should the bill become law.

We believe under those circumstances the Supreme Court, looking at another case in the future, would reach the conclusion that you have in mind. The guidelines are clear, the reasons are clear. The will of Congress is clear.

Mr. SCHERER. Now this bill, as I understand it, is limited solely to classified information, is it not?

Mr. BARTIMO. That is true, sir.

Mr. SCHERER. Since 1952, I remember the Defense Department has been asking for legislation similar to this that deals with nonclassified material, has it not?

Mr. BARTIMO. I am not familiar with that, Mr. Scherer.

Mr. SCHERER. I have listened to testimony from the Defense Department asking for legislation similar to this to deal with individuals in defense plants where the individuals do not handle classified information.

Mr. BARTIMO. Yes.

Mr. SCHERER. But would be working on normal or regular weapons of war.

Mr. BARTIMO. Yes, I think, Mr. Scherer, if we may for the record, I believe you had in mind a piece of legislation which—if I may deviate for a moment and congratulate this committee for its marvelous work in not only getting the bill through the committee but past the House, whereby the Secretary of Defense, upon his finding that a

particular plant or industry is considered a defense plant industry, and such a plant or industry is posted, it puts on notice a member of the Communist Party that he would be in violation of a criminal statute to continue to be so employed in such a facility. That is point number one.

Mr. SCHERER. Pardon me. That provision is applicable since the Supreme Court last fall sustained the Internal Security Act of 1950.

Mr. BARTIMO. That is correct, sir, I agree.

Mr. SCHERER. You think that eliminates the necessity for the legislation which the Defense Department has been requesting since 1952, that we have legislation or that we authorize the setting up of procedure to deal with individuals in defense plants who are not handling classified work? I know I introduced a bill a couple of times to take care of that situation, at the request of the Defense Department.

Mr. BARTIMO. Yes, sir, let me say this. I think that, in part, I would agree with your statement. However, what you are really coming up against on the nonclassified information is a very esoteric area of great magnitude. Let us say this—and I am sure this committee realizes it far better than we—that an individual may go around and pick up pieces of unclassified information; when those pieces are put together, it may in effect result in a classified document. This has been proven, as you know, from research groups that have done it.

I think there was a group at Yale that did it. They picked up the various committee hearings, the appropriation hearings, what appears in technical magazines, such as *Aviation Week*, and they put that together and it became a bundle of useful information.

I do not know that we can ever find the panacea to solve this ill. We are a free nation, a free democracy; the fourth estate operates with great freedom; I am sure we want it that way.

I think as a point of departure, however, it is up to the individuals who have access freely throughout our country to have a degree of responsibility. Security in this Nation is not only the job of this committee and the officials in the Department of Defense. In our judgment it is the responsibility of every citizen.

It seems to me that discretion and judgment are most important; that if an individual or a newspaperman or a technical magazine has gotten access to information which in their judgment should be known to be sensitive, they ought to treat it as such.

I don't believe, sir, that we can ever legislate that all information not classified has to undergo certain rules and regulations. I think we would frustrate the very freedoms we are seeking to preserve.

Mr. SCHERER. Well, I am not talking necessarily about information; but I remember your predecessors from the previous Administration, who came from the same agency in the Defense Department that you gentlemen do here today, pointed out that they lacked the ability, because of the lack of legislation, to take care of a subversive person who didn't even work in the defense plant, but worked in a utility plant that supplied power to a defense plant; and they were asking us for legislation since 1952 to set up procedures whereby we might either get rid of that person in that position or in some way control him, because they pointed out that that individual was as dangerous to our security as a person handling classified information,

or a person actually employed in the defense work on normal defense weapons.

Now that is the point. We have no legislation to deal with that, except perhaps the Internal Security Act, which has now been held constitutional and which says that no Communist may work at such a position. But what about a person that you cannot prove is a Communist? And most of the persons that would be in a position to pull the switch may not be members of the Communist Party.

Mr. BARTIMO. I think specifically, Mr. Scherer, on the point, your example of the subversive, if we could determine and prove he was a subversive, undoubtedly he would also be a Communist.

Mr. SCHERER. That is not necessarily so.

Mr. BARTIMO. Well, in the case where it isn't necessarily so, I would have to agree with you, on your example, that we do have a hiatus, that it is an area in which we do not have specific statutory authority to move.

Mr. SCHERER. You don't have statutory authority to cover even persons working in defense plants on conventional weapons, do you?

Mr. BARTIMO. That is correct.

Mr. SCHERER. Now has the Defense Department abandoned its request for such legislation? I won't keep on introducing my bill if you have.

Mr. BARTIMO. I believe the answer to that is, it is not necessarily abandoned. It is I believe a very, very difficult area to legislate in.

Mr. SCHERER. Are you familiar with the bill that I introduced?

Mr. BARTIMO. I am not, and I apologize. We should reread your bill.

Mr. SCHERER. Well, it wasn't my bill, it was recommended by the Defense Department. The language in it was recommended.

The CHAIRMAN. Defense and industrial.

Mr. BARTIMO. May we take this point up later and relook at the bill, and determine if the position of the Executive Branch is as it was, evidently, when it was submitted here?

Mr. SCHERER. Yes. The only reason I raise that issue now is, if it is necessary that we have such legislation, and if you still feel that it is necessary—and I certainly feel it is, because I feel that a person such as I have mentioned is as dangerous, perhaps, to the security of the United States as is some person handling classified material—we perhaps could add such provisions to this bill.

Mr. BARTIMO. May we take a look at it, sir, when we go back to the Pentagon?

Mr. SKALLERUP. It is certainly an appropriate time to consider it, sir.

The CHAIRMAN. May I ask you whether or not you conferred with Justice concerning this proposal? Because they are well acquainted with what Mr. Scherer is talking about.

You see, the thing that disturbs us is—today a particular plant is covered, and tomorrow it isn't. Changing conditions, of course, have to be met. I believe that the Justice Department has some very strong views on this.

Mr. BARTIMO. We will be most happy, Mr. Chairman, to consult with our colleagues in the Justice Department on this point.

The CHAIRMAN. Have you submitted your proposal to the Bureau of the Budget?

Mr. BARTIMO. Our proposal has been submitted to the Bureau of the Budget, and they have determined that our recommended proposed legislation conforms to the program of the President. Therefore, it is approved by them.

The CHAIRMAN. Therefore, the Justice Department has seen it.

Mr. BARTIMO. The Justice Department has seen it, and you will have the opportunity to have the Assistant Attorney General, Mr. Walter Yeagley, as a witness, I understand. I am sure he will be most happy to address himself to this point.

The CHAIRMAN. All right.

Mr. SCHERER. In considering the proposition that I raised, you might want to take a look at our hearings in the Pittsburgh area, designed to support legislation such as I have indicated, in which we showed that there were five plants in the Pittsburgh area whose employees were represented by unions that had been expelled from the CIO because they were Communist-dominated and controlled, and also showed that individual members of those unions were members of the Communist Party, at that time working on defense contracts. Not classified, however, but working on defense contracts. And it has been indicated, we have no legislation to handle those individuals.

Mr. BARTIMO. We will be glad to look at that, Mr. Scherer.

Mr. SCHERER. One of those plants could be easily sabotaged if we should get into a shooting war with the Soviet Union.

Go ahead. I am sorry.

Mr. SKALLERUP. Section 302 contains an express legislative authorization whereby the Secretary of Defense, under such regulations as the President may prescribe, may limit the opportunity for cross-examination. In stating this authority, the draft bill does not expressly reiterate each and every requirement and condition set forth in the Executive Order. However, we believe there is no conflict between what the draft bill requires and what Executive Order 10865 requires.

The Department of Defense intends to continue to apply all the requirements of the Executive Order and in so doing will meet every requirement expressed or implied in the proposed legislation.

At this time I submit for the record, a copy of Department of Defense Directive 5220.6,[1] dated July 28, 1960, which carries into effect the authority granted by Executive Order 10865. A copy of that Executive Order is appended to the directive. I also submit copies of Executive Order 10909, which amended Executive Order 10865.

Section 303 of the revised draft bill would provide legislative authority whereby the Department of Defense could pay travel expenses and a per diem available from appropriated funds to cover the expenses of witnesses called by the Department of Defense to give testimony or produce evidence in personal appearance proceedings. By virtue of Executive Order 10909, the Department of Defense is expressly authorized to furnish travel in kind and to pay other actual expenses to witnesses not to exceed a per diem of fixed maximum amount. Section 303 also would provide legislative authorization

[1] Department of Defense Directive 5220.6 marked "Exhibit No. 3." See appendix, p. 525.

for the payment of certain fees in connection with taking depositions.

For many years the Department of Defense has authorized the reimbursement of lost earnings directly caused by adverse actions in the review program. This action has been discretionary with the Department, and has not been intended to create a legal right in an applicant to demand reimbursement. Reimbursement is not contemplated for applicants who have not been found eligible for access authorization prior to the time of filing their claims. Reimbursement is intended only when and to the extent required by considerations of fairness and equity.

The draft bill is intended to express the policy that reimbursement is absolutely discretionary with the Department: that it is not a legal right of the applicant under this bill; that it will be made only on grounds of fairness and equity which clearly show that the Government, rather than the applicant, should bear the loss: and that the maximum reimbursement must be calculated in terms of nonspeculative sums of money.

The section would grant such authority and make appropriated funds available.

As indicated in the Department's letter transmitting the revised draft bill, the Department of Defense has entered into mutual agreements with certain other departments and agencies of the Government: namely, the National Aeronautics and Space Administration, the Federal Aviation Agency, the General Services Administration, and the Departments of State and Commerce. Under these agreements the industrial security program of the Department of Defense is made available to other agencies of the Government for the resolution of cases in which such agencies are concerned with safeguarding classified information which they are responsible to protect.

By these agreements, an economy of effort and funds can be accomplished while, at the same time, affording a wider base for the application of the experience of the Department of Defense in administering this program. Section 305 of the revised draft bill is designed to approve such agreements now in effect and to provide legislative authority to enter into similar agreements with other agencies or departments, as desired from time to time.

In recent years, the Department of Defense has been administering a program to provide protection for classified information belonging to other countries which is entrusted to the United States and released to United States industry in furtherance of international defense efforts. The term "classified information" in section 301 is understood to cover broadly all classified information, regardless of country of origin, which the Department of Defense is obligated to protect.

(At this point Mr. Walter left the hearing room.)

Mr. SKALLERUP. As you can see, the draft bill does not include subpena authority. Experience under Executive Order 10865 has shown that most cases can be resolved on the open record through witnesses and documents presented by the Department to the Field Board. The extreme minority of cases (11 out of 800) in which certified testimony and documents may be needed would not be resolved by subpena authority because certified testimony and documents would still be needed. The Department would prefer to gather more experience be-

fore supporting a grant of subpena authority at this time. It will advise the Congress if and when the authority has been shown to be necessary to the continued success of the program.

(Mr. Doyle presiding.)

Mr. DOYLE. Proceed with your statement, please.

Mr. SKALLERUP. We shall be happy to try to answer any questions that the committee may wish to ask and to furnish in greater detail any information which thus far has been covered only in general terms.

That concludes my statement.

Mr. DOYLE. Thank you very much.

Counsel, do you care to ask any questions?

Mr. NITTLE. Yes, sir. Mr. Skallerup, I want to call your attention to the letter of March 14, 1962, of the General Counsel of the Department of Defense, forwarded to the committee in response to its request for the views of the Department. This letter has already been offered for the record at the commencement of this proceeding.

There is a statement therein as follows:

> In view of the action of the President in Executive Order 10865, the proposed legislation is not considered necessary.

Now in view of the fact that a committee of the Congress does not wish to engage in useless motions, perhaps that should be clarified on the record.

Certainly, we do not mean to suggest by the introduction of H.R. 10175, which is the bill under consideration, that the Defense Department has not met its responsibilities following the decision in *Greene* v. *McElroy*, or prior thereto. As a matter of fact, your Executive Order 10865, which was promulgated immediately after the decision, was an attempt by the Defense Department and the President to fulfill its responsibilities in maintaining the security of classified information released within industry.

However, I call your attention to certain language in *Greene* v. *McElroy*. The Court struck down the security procedures of the Defense Department on the ground that in setting up what may be described as a limited hearing procedure, the Department had exceeded its authority. Chief Justice Warren said, "it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use."

Perhaps more pointed is the language of the Chief Justice at page 508:

> Whether those procedures under the circumstances comport with the Constitution, we do not decide. Nor do we decide whether the President has inherent authority to create such a program, whether congressional action is necessary, or what the limits on executive or legislative authority may be. We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.

Now, Mr. Skallerup, in the light of that language of Chief Justice Warren, would you not agree that congressional action would place the Presidential order upon a firm basis and would remove any doubt at all as to the Presidential authority to create the specific program which has been set up in Executive Order 10865, as amended?

Mr. SKALLERUP. Inasmuch as I have Mr. Bartimo from the General Counsel's Office and inasmuch as your questioning relates largely to questions of legal authority, I think it would be appropriate for me to ask Mr. Bartimo to answer it.

Mr. BARTIMO. Thank you, Mr. Secretary.

I think, Mr. Nittle, you are raising a very significant and a very important point in which we ought to build some clear legislative history. I think your quote from *Greene* v. *McElroy* is very pertinent.

The Supreme Court did not cross the bridge of whether or not the procedures violated any constitutional provision, as you have indicated. It simply said that the Department of Defense does not have the authority either specifically under an Executive order of the President or a statutory provision. In my judgment, the Supreme Court in a statesmanlike manner was pointing to us a way to remedy the defect.

I believe you will agree with me that we should not make any legislative history in this bill which would indicate or cast the least doubt that the Executive Branch is impotent to act in an area so important as protecting the classified information of our Government.

I think we ought to be clear that the President of the United States, under his constitutional prerogatives, under his constitutional mandate, has the authority and has the duty to step in and act.

(At this point Mr. Tuck left the hearing room.)

Mr. BARTIMO. I think the President of the United States did that when he promulgated the Executive Order to which you refer.

Mr. SCHERER. Now I agree with your reasoning thoroughly, because that is where I disagreed with the Supreme Court in the Greene case. I think the President, as Commander-in-Chief, has the right to do what he wants with classified information of this Government, and he should be able to prevent a person from having classified information if he doesn't like the way he parts his hair, because classified information is a property right in the Government of the United States.

Mr. BARTIMO. I agree with you.

Mr. SCHERER. I then agree with Mr. Nittle, although I don't agree with the decision, that we should do everything we can to comply with the Court's decision.

Mr. BARTIMO. I agree that we should, Mr. Scherer.

Mr. SCHERER. I think it is wrong. I think the Supreme Court is wrong in this case. I think the President does have inherent right, as I said, as Commander-in-Chief, to control a property right of the Government of the United States and to let his agents or employees or any individuals have possession of it so long as he wants them to have possession of it.

He should have the inherent right to deprive them of it, whether they are security risks or not.

Mr. DOYLE. May I suggest at this point, the bells have sounded.

Mr. SCHERER. Is that a quorum call?

Mr. DOYLE. That is a quorum call.

Mr. TAVENNER. Have you finished?

Mr. BARTIMO. No, sir.

Mr. TAVENNER. May I suggest, the witness has not quite finished, and if you could remain long enough——

Mr. JOHANSEN. Could we wait, Mr. Chairman, until the second bell?

Mr. DOYLE. Well, we will still have to adjourn for 20 minutes, anyway, when we do go.

Mr. JOHANSEN. You are coming back?

Mr. DOYLE. Oh, yes, we must come back, but may the witness understand we regret that the bells have sounded, and we must go, but we will return at the earliest possible moment.

Mr. SCHERER. Can he finish his statement that I interrupted?

Mr. DOYLE. Yes, proceed.

Mr. BARTIMO. In addition to the statement I have made, Mr. Nittle, you are raising a very significant point as I have stated: Is legislation necessary? I believe that that question can be answered succinctly, that it certainly is a marvelous thing to have the President's Executive Order buttressed by the will of the Congress, to set forth clearly a congressional intent.

I would like to add a footnote to Mr. Scherer's remarks, also for legislative history. The Supreme Court did not in its decision in *Greene* v. *McElroy* upset the entire industrial security program. All it said is that we do not have either Executive authority or statutory authority to finally deny an individual without a confrontation hearing. The rest of the industrial security program, as the Secretary indicated, is a vast one. Only a small percentage of cases are affected by hearings which involve the confrontation issue.

I think he said about 11 cases, and I think it is significant for us to pin that point home.

Mr. DOYLE. The committee will stand in recess for about 15 or 20 minutes while we answer the roll call, and then we will immediately return.

Sorry to cause the witness this inconvenience.

(Whereupon, at 11:05 a.m., the committee was recessed to be reconvened the same day.)

AFTER RECESS

Committee members present: Clyde Doyle, of California; Gordon H. Scherer, of Ohio; and August E. Johansen, of Michigan.

Mr. DOYLE. Let the committee reconvene. A quorum is present, following the quorum call on the floor.

Are you ready, Counsel?

Mr. NITTLE. Yes, sir.

Mr. DOYLE. Proceed.

Mr. NITTLE. Mr. Skallerup, the Supreme Court in *Greene* v. *McElroy* seemed particularly concerned that there should be an expression by the President or the Congress that the actual procedures established are necessary.

Now it would seem that the mere fact that these procedures have been adopted in Executive Orders and in regulations of the Secretary of Defense would be a clear expression of their necessity.

Nevertheless, it seems that to clear the record, there should be a positive expression on your part as to whether or not a limited hearing or personal appearance procedure, such as is established in the bill under consideration and also under your proposed draft bill, is necessary in fact.

Mr. SKALLERUP. In our view, it is not only desirable, but necessary.

Mr. NITTLE. Could you elaborate on the point of necessity for establishing a personal appearance proceeding which limits, in certain reasonable circumstances, the confrontation and cross-examination of adverse witnesses?

Mr. SKALLERUP. Mr. MacClain will respond.

Mr. MACCLAIN. First of all, I should like to say that we strongly endorse the principle that we should do everything within our power to provide each applicant with every reasonable opportunity to demonstrate his eligibility as he sees it, and that we should do everything within our power, likewise, to inform him of the things about him that have come to our knowledge that raise questions in our mind as to his eligibility. But it is plain from experience that there are sources of information which are valuable to the United States Government in its continuing effort to protect the security of the Nation, and that the value of these sources of information is lost when the sources are identified.

It isn't a situation where you are considering an activity of a man in the light of whether or not he should be criticized for that activity and whether or not, in order to prove his activity, you bring forth or don't bring forth a particular informant. In our area, what we are doing is protecting entirely the interest of the United States. If an informant is vital to that interest, then his identity must necessarily not be disclosed if we are to continue to have him available for the purpose intended.

This, from our experience, does happen, and from our experience, we know that we do need to have the authority to limit the right of cross-examination for this purpose. At the same time, we know that in achieving that end, we can also help to serve the interest of the applicant by summarizing for him as much of the information as we can, without disclosing the identity of this confidential and precious source.

If the committee would like to have me do it at this time, or at any time, we would show how the proposed revised bill, interlocking with the Executive Order, would accomplish these purposes and, at the same time, establish for the individual case the degree of reliability of the source and the accuracy of the information from the source. This is slightly detailed, and I would be very glad to do it, if you would like it to be done.

Mr. DOYLE. Yes, we would like very much for you to do it.

Mr. MACCLAIN. There are in general two classes of witnesses. We may call one of these classes the confidential witness who is engaged in furnishing intelligence information to the United States Government. This category of witness is especially the kind whose identity must not be disclosed.

Under the Executive Order and under our program as now operated and under the proposed revised bill as we would see it, this category of informant is made available to our program through a certificate from the head of the investigating agency whose informant it is. For example, the Attorney General would furnish a certificate for an informant in that category, and the certificate would state that the informant is a confidential informant, that he has been engaged in furnishing intelligence information to the Government, and that the

disclosure of his identity would be substantially harmful to the national security.

The other category of informant is just anyone who has information with respect to the matter at hand. He could be a friend or a neighbor or a fellow employee or a doctor or just anyone who has information available. Here the purpose of permitting us to use his information is that the circumstances laid out in the Executive Order, and as they would be implemented under our proposed bill, are such that it is literally impossible to produce him for cross-examination. Thus, the witness could not be produced because of death or serious illness or for a similar reason, or for some other reason which the head of the department concerned—in our case, the Department of Defense—determines is a good and sufficient reason.

If the head of the department is prepared to make a preliminary determination as to the reliability of the source and the accuracy of the information, based upon information furnished to him by the investigative agency, and if the head of the department is further prepared to state that failure to use this informaion would adversely affect the security of the Nation, and if after all of that has been said and done, he is ready to state the reason why the informant cannot come forward for cross-examination, then, under those circumstances, we can use that information.

Now with respect to both of these categories, there are not only these conditions precedent to the use of the information, but there are also conditions subsequent. The first condition is that the individual shall be informed of the information as fully as the national security will permit. Secondly, consideration must be given to the fact that opportunity for cross-examination was not made available to him, and finally, and maybe most important of all, under the Executive Order and under our regulations, and under our intention, an adverse decision in that kind of a case can be made only by the head of the department.

So you can see that with respect to our authority to limit cross-examination, the decisions as to the need for it and the final decision, if it is adverse, on eligibility, are placed right at the head-of-department level, which gives the individual maximum protection within the Executive Branch.

I want to add just a further word. In our experience in administering the program under the existing Executive Order, we view this authority to limit cross-examination as something to be utilized only when absolutely necessary. I think that this is demonstrated very convincingly by the fact that, after operating since August 1960, we have today out of several hundred cases only 11, and maybe less than 11, in which we think it will be necessary to use this exceptional procedure.

Now this is our attitude, but we absolutely know that there are those cases where, if we are going to safeguard classified information and not disclose precious sources, we have to have this type of exceptional authority, which is one of the subjects in this bill.

There is a little further word on this subject that Mr. Bartimo would like to add.

Mr. BARTIMO. I think that Mr. MacClain has made a very lucid and succinct statement on the exceptional procedure in the overall picture

here, but I think we ought to put on the record the fact that the Department of Defense, or the Executive Branch, is not seeking to control the movements or the employment of individuals in civilian life.

This is not our objective. I think it is important to note here that when the Executive Branch has classified information, this information belongs to the country, to the people who are charged with protecting this information. Therefore, it is our view that access to this information is not a right; it is a privilege.

Based on that philosophy, we have bent every effort within the American framework, the American spirit of giving everyone who wants the privilege of getting access, what we believe is a fair hearing.

I think this is important to bear in mind throughout the hearing, that we are not denying anybody the right to go to work at plant A or B or wherever he chooses.

I think it is important also to note that where an individual who comes to us for consideration for access to classified information, and is denied that access to classified information, it does not necessarily follow that this individual must be dismissed from his employment. He might work in an area where there is no classified information. He certainly has the right to manufacture percolators or automobile wheels, or many of the millions of gidgets and gadgets which our economy needs. But he certainly shouldn't have the right after this screening process, if there is some doubt as to his reliability or trustworthiness, to have access to our classified information.

I think that this view is most important, and I would hope that the courts, in analyzing a case which might come before them, would give due consideration to this basic understanding, this basic philosophy.

Mr. NITTLE. Certainly, would you not agree that the Government is placed in a very serious dilemma if it cannot control access to classified information?

If the Government cannot control it, then the Government must either divulge this information, release it to persons of doubtful character and integrity, or not have necessary work done in industry. Isn't that correct?

Mr. BARTIMO. I would say that is correct, Mr. Nittle.

Mr. SCHERER. Don't you think—and if classified information is a property right, it belongs to the Government of the United States—don't you think we are leaning over backwards when it becomes necessary to deprive a person of further access to classified information to even make all of these procedures available to him?

He has no basic right to that information, does he? As you point out, it is not a right, it is merely a privilege. He acquires no property right.

Mr. BARTIMO. Well, Mr. Scherer, I think you and I agree that under our American way of life, we should take every precaution, every means at our disposal, to be certain that we do not stigmatize unjustly an individual; and I think you will agree that because we are human beings, mistakes are apt to be made.

We want to stretch every effort to be certain that our procedures are such that we don't make a good citizen a citizen who is disgruntled because he was unjustly accused. This is fundamental in our criminal procedures. We are willing in our criminal procedures to have a

criminal go free rather than to incarcerate the innocent. Within that philosophy, and always having in mind that we must protect the national security interests, these procedures are geared with the hope that they will be accepted by the Congress and the American people and also the courts.

Mr. DOYLE. May I inquire if unclassified information is the property of the Government? What is the property right of an applicant to have unclassified information given to him? What is his right of claim to that, if any?

Mr. BARTIMO. Well, Mr. Doyle, I think that we are agreed that any information in the possession of the Executive Branch is information belonging to all of the American people. Some of it must be classified, because our potential enemies might make use of it to our detriment. The unclassified portion of the information which you address yourself to is that information which ordinarily is in the public domain, and yet, there is a segment of that unclassified information which should not be in the public domain, because it is privileged-type information.

For example, supposing the Executive Branch were debating whether or not a certain policy should be promulgated. Many views are gotten throughout the Executive family; oftentimes we consult informally with the Congress to get their guidance. Until the policy is promulgated, it is not fair to release that type of information, it seems to me, to the detriment of candid views, to the detriment of a solid, educated policy that has all the facts and figures. I think it is important to note that where that type of situation prevails, various pressure groups might come in and press their point of view.

This is the reason, I think, and I am sure we all agree, that we should have this type of Executive-privilege philosophy. It is not that we are withholding information. It is only because we want, in all candor, to examine all possibilities, so that when the final decision is made, it is the best judgment of the people who have the responsibility to make the decision.

Mr. DOYLE. May I further inquire at what level is the screening of the information about an applicant made? Before you send the applicant any notice to appear, how many people are involved in making that decision, so as to screen it for veracity and lack of bias and these other things that might well enter into it?

Mr. BARTIMO. Mr. Lewis is here today to answer questions along this line, sir.

Mr. LEWIS. The final screening before a Statement of Reasons would be issued to the individual is done by a Screening Board located in the Office of the Assistant Secretary of Defense. At the present time——

Mr. DOYLE. Would you speak up just a little louder?

Mr. LEWIS. I am sorry.

At the present time, we have a six-man screening board, sitting in two panels, made up of senior military officers and civilians of considerable experience, both in security and with legal training. And it is only after a group of three men has completely evaluated all of the investigative material that the letter of charges or the Statement of Reasons is issued.

Mr. DOYLE. Does that board, after screening the material, ever refuse to put an applicant on notice that they have discovered prejudice

or ill will or anything of the sort entering into a complaint or information? Has that ever occurred?

Mr. LEWIS. Well, all of the information is very carefully evaluated, and as the Secretary pointed out earlier, a vast percentage of the cases which reach this level do result in clearances by that board.

Mr. DOYLE. How do they reach that level, those cases? This board? And what levels do they reach before they get to the board?

Mr. LEWIS. The cases originate within the military departments, and they originate at the field level. Each of the military departments has a slightly different organizational setup.

Let me describe the Army setup for you. The security office at the headquarters of each Army in the United States—each Continental Army, plus the Military District of Washington, has a security office which is responsible for initially processing the requests of industry for an access authorization. They conduct the necessary record checks and field investigations and then evaluate the results. If in their opinion the officials at the Army level are satisfied with the results of the record checks and investigation, they are authorized—they have delegated to them the authority from the Department of Defense—to grant the access authorization. If they do not, or if they are not satisfied with the results, then the case is forwarded from the Army level to the Department of Army Headquarters, the Assistant Chief of Staff for Intelligence.

There another review is made. Further investigation may be made; and after the additional work is done, if in the opinion of the Assistant Chief of Staff for Intelligence for the Department of the Army the man should be granted access authorization, the case ends there.

If he does not feel that he wants to grant the access, the case then comes to the review office in the Office of the Assistant Secretary of Defense, and then the Screening Board may do more work. We may interview the man. We may ask for still more investigation, and in a large percentage of the cases, the Screening Board disposes of the case favorably to the man.

Mr. DOYLE. Thank you very much.

Mr. JOHANSEN. Mr. Chairman, may I make the observation that if there were—and this is not said critically—but if there were a requisition for an employee or for a contractor on a hurry-up job, I suspect there would be some time consumed in the process you have detailed.

Mr. LEWIS. Yes, there is. The initial inquiries, at least through the secret level, are primarily record checks, and they are accomplished in a relatively short period of time. If the record checks develop questionable information and the case has to be converted to field investigation, then a considerably longer period of time may result.

All of these people are already working for the company at the time the requests are initiated, so it isn't as if they were seeking employment at the time——

Mr. JOHANSEN. But they are seeking assignment.

Mr. LEWIS. Within the company, yes.

Mr. JOHANSEN. Now my question is a serious one in this respect, that to what extent are you estopped from pushing this one person, or this one contractor, aside due to delays inherent in resolving the question, and substituting, if there is a factor of urgency?

In other words, are we actually, in the process of our extreme caution to protect the rights and interests of the individual involved, throwing a delaying factor into what may be an urgent timewise procedure or operation?

Mr. LEWIS. Well, if you are addressing your question, sir, to the facility itself, I would say the answer is no. I have had no experience that would demonstrate that any vital defense industry, or part of industry, was affected in its efforts to produce on a contract because of the time factor in processing requests for individuals who would be working for the company on a contract.

It is true that certain engineering personnel, as well as blue-collar workers who might require access, individually would be delayed in getting access if in the course of investigation we discovered sufficiently derogatory information to warrant bringing the case all the way up to the Office of the Assistant Secretary of Defense and processing it through the review program, yes sir.

Mr. SCHERER. And we are doing this in an instance where we are dealing with a privilege rather than a basic right?

Mr. SKALLERUP. That is true.

Mr. SCHERER. Legally, we would not be required to do it?

Mr. SKALLERUP. I would be reluctant to come to that conclusion legally, Mr. Scherer. We are bending over backwards to be fair, and they do get a fair hearing.

Mr. SCHERER. Yes, I understand that. But when you do provide them with cross-examination and confrontation, that is required, of course, under the law when you are attempting to deprive a person of a basic right, namely, when he is charged with a criminal offense and he may be deprived of his liberty or fined. Then is when the law requires confrontation and cross-examination; but certainly, if we come to the conclusion that classified information, as counsel did, is not a basic right—a person has no property right to it, it is only a privilege that the Government extends to an individual to have that—then certainly he is not entitled to a confrontation or cross-examination. He is not really entitled, except that you want to be fair in all of these procedures set up, which Mr. Johansen pointed out may, in the long run, affect the security of the United States.

Mr. DOYLE. May I ask, Mr. MacClain? I think you used the term, Mr. MacClain, describing the area in which a certificate could be made properly by the Secretary, for reasons of death or serious illness?

Mr. MACCLAIN. Yes, sir.

Mr. DOYLE. And then you used the phrase "or some other reason." Now are you in a position to tell me what other reasons would be considered comparable to death or serious illness to justify the circumstances?

Mr. MACCLAIN. Mr. Doyle, those particular words are in the Executive Order and in our proposed revised bill.

Mr. DOYLE. I notice they are, but they don't specify.

Mr. MACCLAIN. The experience to date has not brought up a single instance in which we would have to make a determination of the meaning of those words "good and sufficient cause" as used in Section 4(a)(2)(B) of E.O. 10865, as applied to a particular case. We do know that in this area there are some situations of a very high degree of sensitivity from the standpoint of the information involved. And

we know that if we have that kind of case, and we have an informant who would otherwise be available to us, but for a reason which at this moment I really cannot describe, but to the head of the department would seem good and sufficient reason as compared to this very high degree of sensitivity, in that situation, sir, an attempt would be made to resolve the meaning of those particular words.

Certainly, there is no intention to make use of those words as any—in a manner of speaking—as any easy way out. It is going to be the hardest possible way out, before we use them, sir.

Mr. DOYLE. Counsel, do you want to proceed?

Mr. NITTLE. Yes, sir.

Now with respect to the procedures for personal appearance by aggrieved applicants set forth in H.R. 10175 and your draft bill, certainly you do not regard these procedures as an admission in derogation of the absolute right and power of the Executive to control access to classified information?

Mr. BARTIMO. Mr. Nittle, I agree with the point you are making. But we must keep in mind what Mr. Scherer has brought out, what we from the Department of Defense have indicated as the necessity and the philosophy and the reasons behind the procedures. But, categorically speaking, you are absolutely right.

Mr. NITTLE. I believe that is the interpretation which is to be placed upon the statement in section 9 of your Executive Order 10865, which reads as follows:

> Nothing contained in this order shall be deemed to limit or affect the responsibility and powers of the head of a department to deny or revoke access to a specific classification category if the security of the nation so requires.

Now, as a matter of fact, there are other powers involved here, are there not? And I ask this question with respect to present procedure. In *Greene* v. *McElroy*, by procedures then in effect, the Defense Department entered into a specific contract with an industrial establishment relating to personnel security matters. This was a contract between two parties only, the employer and the Defense Department, which provided, in fact, that the contractor shall exclude from any part of its plants, factories, or sites at which work for any military department is being performed, any person or persons whom the Secretary of the military department concerned or his duly authorized representative, in the interest of security, may designate in writing. Greene was not a party to this contract, and acquired no legal rights under it.

Mr. BARTIMO. Mr. Nittle, I think that the point you are bringing out is a very important one. I think this is a good point on the record, for us to indicate that the Greene case, *Greene* v. *McElroy*, was based on a peculiar set of circumstances which the Supreme Court found to be present in that particular case. I would like to quote here from a brief of the Government in Stephen L. Kreznar case, where the Government on p. 12 stated:

> The Greene case involved the revocation of a security clearance granted to Greene, an aeronautical engineer employed by a company devoted primarily to developing and manufacturing mechanical and electronic devices for the Armed Services. He had been with the firm for over fifteen years, and had become a chief executive officer of the company. His work was of a specialized nature, and could not be performed without access to classified information.

When his clearance for access to such information was withdrawn, there was no work for him to do and he was discharged. He could not thereafter obtain employment in the aeronautical field because of his lack of security clearance, and he was forced to accept much lower paying work.

On that peculiar set of facts and circumstances, the Court evidently concluded that this particular individual was being denied some rights—the Court didn't specifically state what those rights were—the Court was concerned by not having what it called a fair hearing to determine whether or not the decision of the Department of Defense was correct.

It is interesting to note that the Court in the Brawner [1] case adhered to the philosophy which you have expounded, and that is, that the commanding officer of a Naval installation had the authority to deny access, ingress, egress, from that installation, without a hearing. So, therefore, the courts, I think, are becoming cognizant of the point you are making. I think, we ought to pin home the point that Greene was a particular fact circumstance, and the Court, as I have indicated earlier, in my judgment, was being statesmanlike in indicating to us how we could improve our procedures under the American way, giving a man a fair hearing.

Mr. SCHERER. But the Court did that, I think, on the false assumption that Greene has a basic right to classified information.

Mr. BARTIMO. Mr. Scherer, you may be right. I would differ——

Mr. SCHERER. I think it was a false assumption the Court acted under.

Mr. BARTIMO. You may be right——

Mr. SCHERER. And that is the only way it could arrive at the decision it did arrive at, assuming that he had a basic right rather than, as you said a few minutes ago, a privilege.

Mr. BARTIMO. You may be right in your interpretation. We have had many interpretations of what the *Greene* v. *McElroy* case means. I prefer, in charity and as a lawyer interested in the area, to construe the case as the Supreme Court setting forth its judgment that our procedures should be improved.

For example, the Court said that we had not the right in the absence of an express authorization under an Executive Order or a statute to run the industrial security program in the precise manner that we did in that case. But the Court added, had it found that we gave a confrontation and cross-examination type of hearing, it would have determined that we had that right by implication. This to me was the handwriting on the wall, the statesmanlike opinion of telling us to improve our procedures, as I believe we have.

Mr. SCHERER. The Court indicated, as you say and as I remember, in the Greene case, that it might hold—even though the proper procedures were set up or even though the Defense Department had the delegation of authority, either from the Congress or the President, to set up these procedures—at a later time that this individual is entitled to confrontation. Didn't the Court hold that in that case?

Mr. BARTIMO. I believe the majority opinion did——

Mr. SCHERER. Entitled to cross-examination.

Mr. BARTIMO. I believe the majority opinion did not go so far as to make that judgment.

Mr. SCHERER. But it said that some place in the opinion, didn't it? One of the Justices said that?

[1] Cafeteria and Restaurant Workers Union, Local 473, *AFL–CIO* v. *McElroy*, 367 U.S. 886 (1961).

Mr. BARTIMO. You may be correct, but I think in order to be completely responsive to your hypothesis on what Greene means, and I think that as I agree with you that access to classified information is a privilege and not a right, you begin to get to what I call a gray area. Under the fact situation of Greene, which was peculiar, you begin to get into an area where the courts have said in other cases you might unjustly stigmatize a good American because you haven't given him a fair hearing. Where does that fine dividing line come then? I agree with you that access to classified information is not a right, it is a privilege. But in adhering to certain procedures, where do you stop? From the clear demarcation of a right and a privilege? And what of those elusive gray areas? Where do your procedures unjustly stigmatize?

I think this is what the Court was worried about. I believe that the Executive Branch, the President's Executive Order, and the regulations we prescribed would be wholeheartedly adhered to by the Supreme Court, should we get another case. I would hope so.

Mr. JOHANSEN. May I interject at that point, is it your belief that under the Executive Order issued subsequent to Greene that in an identical case—or the Greene case, had that existed prior to the action in his case—the courts would hold that his denial of access was a valid denial?

Mr. BARTIMO. I would say, Mr. Johansen—and I am sure you will find better informed lawyers than I in this field who might disagree with what I am about to say—it is my judgment that should the Greene case, or a case similar to the Greene case, go before the Supreme Court, having gone through the procedures we are now operating with, the Supreme Court would hold that we have given him a fair hearing. I believe the Supreme Court—and I would hope it would—would commend us for picking up what it considered a challenge for an improvement. I believe the Court would say: "You have improved your procedures."

Mr. JOHANSEN. May I now press the question one step further? Assuming the hypothetical situation in which you have a Greene case, completely identical with these existing procedures, and assuming that in that case there was a determination, in consequence and responsive to the rules and procedures and by the proper authority, that there should not be confrontation and cross-examination, would your belief as to the similar action standing up apply to that situation as well?

Mr. BARTIMO. Mr. Johansen, again, with the same caveat that other lawyers might disagree with me——

Mr. JOHANSEN. Well, I think the committee is not going to accept that.

Mr. BARTIMO. It is my judgment, if we had a case where the Secretary of Defense personally made the determination that this particular individual is not entitled to access to our classified information and, because of the sensitivity of the case, that he would make a fiat and without procedures he would want to deny this individual access, that the Supreme Court of the United States would uphold that.

I believe that this is a very rare type case. We haven't had one. I would hope it would be a very de minimis type situation. But in my judgment, in these perilous times in which we live, we must give

that authority to a key individual in our Government, who has the responsibility for running his agency. He must have that authority. I believe the President has it. I believe it is legal for the President to delegate it to his top official, in the Department of Defense, the Secretary of Defense, and I would hope that the Supreme Court would adhere to the views which we are expounding here this morning and find that legal.

Mr. JOHANSEN. Well, I am very happy and commend the gentleman for the reference to these perilous times which include some internal perils, as well as external, and I concur completely.

Mr. DOYLE. May I ask one further question?

I have before me the Executive Order 10865, which is referred to on page 6 of the statement this morning by the Secretary, and I call your attention to section 3, subdivision (1) of that. I am especially interested in subdivision (1). This apparently, as I read the order—it is the first time I have had the pleasure of reading it—this is in the preliminary stages of an inquiry, but unless I am in error in reading it—and let me read it out loud—the written statement of reasons why his access authorization may be denied or revoked, I call your attention to this clause, "which shall be as comprehensive and detailed as the national security permits."

Now, am I in error that the person that gives that notice of that decision is not the Secretary?

Mr. SKALLERUP. In this instance, the case has come up through the field organization, as Mr. Lewis described. It has come to the Screening Board, and the Screening Board has made its determination that it cannot grant access. Therefore, the Screening Board prepares a Statement of Reasons, setting forth the basis for coming to the conclusion that the man should be denied access. The question comes up: "How broad, how extensive should this Statement of Reasons be? How far does the Screening Board have to go?"

The Executive Order states that it should be as comprehensive and detailed as the national security permits, so that when the individual who has been seeking access is notified for the first time that he is not going to be given access, he is likewise notified in comprehensive and detailed language—just as comprehensive and detailed as the national security permits—precisely why he is not being granted access. This happens at the Screening-Board level. This board is in the Office of the Assistant Secretary of Defense.

After the individual receives this Statement of Reasons, he is permitted to reply within a reasonable period of time to the statement, under oath or affirmation; and at that point, if he desires, a hearing will be held in a field office—there are three of them in the United States—and he will be permitted to bring in counsel, to bring in evidence, to bring in witnesses, and with respect to those matters that are controverted in his reply to the Statement of Reasons, he may cross-examine the witnesses.

Mr. DOYLE. This, in fact, becomes a preliminary foundation for later action by the Secretary?

Mr. SKALLERUP. Yes, sir; it is the first time that the picture is clarified to the individual seeking access. He is given his Statement of Reasons.

Mr. SCHERER. To which I don't think he is entitled, if what counsel here and I agree on is so, that this is only a privilege. In the sense of American fair play, yes.

Mr. DOYLE. I am not the Supreme Court, but I rather think, until a person is proven to be a risk within the definitions before us, that the person has some rights. I think a person has a right to be informed. I don't regard that as a privilege, Mr. Scherer. I think that what you are doing here, in subdivision (1) of section 3, is some sort of a right of an American citizen.

Mr. JOHANSEN. Well, Mr. Chairman, I am sure, you will agree that it is a relative right, at least to the extent that the Executive Order and this proposed legislation vests an absolute right in the head of the department to deny access in certain circumstances.

Mr. DOYLE. I don't question that for a minute, but up until the time that there is a finding that the man is a risk and shouldn't have access, I think in lay language he is an American citizen that is entitled to know what the charges are against him. He has the right of counsel at all times, under this directive, as I see it. Is that a privilege, or is that a right? The right of counsel under this Order.

Mr. SKALLERUP. If I might answer, part of the difficulty here, when cases of this sort get into Court, as I see it, is in characterizing the problem.

Now in the Greene case, the Court was concerned with a right, but it was not speaking of the right which Mr. Scherer and Mr. Bartimo were speaking about. The Court said that under the specific facts before it in that case, this man has been, to use its own language, "deprived of the right to follow his chosen profession," and as a matter of fact that was the consequence of denying him the security clearance under those circumstances. So the Court said:

> Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or the Congress within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use.

Well, when a case comes down the track to us, we are not sure just how it will be characterized when it gets into Court, so considering the interests of the individual and the Government, we are providing these procedures, so that in the event the upshot is that the man, as in Greene, is denied the right to follow his chosen profession, we will at least be doing it in a way which we believe is consistent with the way set forth by the Supreme Court in the Greene case.

Mr. DOYLE. Well, you are doing it to play safe, as you say—anticipating any possible future Supreme Court decision.

Mr. SCHERER. Let us assume that I am an employer and have owned, maybe under patents, a certain secret formula. I have to have employees apply that formula in the manufacture of whatever commodity I am manufacturing. Suppose I have just reason to believe that an employee is passing on this formula, or his conduct is such that he may pass on that formula to a competitor, a secret formula which I own. Do I then, as a private employer, if the reasoning of the Supreme Court is correct, have to set up some

kind of board, give him a trial in a hearing, to determine whether I can fire him or not?

I think the secrets of the United States which protect the security of this Nation are more important, more vital, than this formula I might have. How far are we going to carry this? How do you explain that?

Mr. BARTIMO. May I make a comment? And I would beg the indulgence of the committee, and I say this in all humility, that semantics is sometimes said to be a science, and I believe from what I have heard, I think valuable discussion for legislative history, that Mr. Doyle is not apart from Mr. Scherer, and Mr. Scherer is not apart from the Department of Defense.

Let us briefly recapitulate. We start with the premise that access to classified information is not a right of any individual. If it were, we would reach ridiculous results. We could have a person from Russia who would become a citizen for the purpose of gaining access and getting information and carting it home to Russia. I think we all agree that is a ridiculous result.

I think, as I have tried to indicate, that you have two principles at stake here. One is the principle that Mr. Scherer propounds, in which I agree, that having access to classified information is a privilege. It is up to the Executive Branch, that has the authority, that is charged by the American people with protecting this sensitive information, all for the purpose of preserving our way of life, to determine that a person must be reliable, trustworthy, and adheres to our fundamental concepts in our way of life.

Our procedures are geared to screen out those individuals which do not meet this criterion, which I am sure we all agree to. Now, how do we get what appears to be a cleavage, from what I understand Mr. Doyle is saying, and from what I understand——

Mr. DOYLE. Now for the purposes of the record, I will stipulate to that point. You and I and Mr. Scherer agree.

Now how about the other areas?

Mr. BARTIMO. Fine. The area where I think that there might be a possible difference, and I would hope that it is a semantic difference, is that where in the peculiar fact situation which we described, and which was present in the Greene case, that you have a peculiar deviation from what I think is the sense of the entire group that is here this morning. I believe it comes from, under a particular fact situation, procedures which were then invoked by the Department of Defense, and an individual found himself in a most peculiar set of circumstances. I doubt if we will even get another case like it. That his training, his background, equipped him so he could only earn a livelihood by working on defense contracts, which meant that he had to have a clearance. The Supreme Court was concerned, I think, not so much on the Greene case itself, but on the principle that you might have made a mistake, that you might have denied a good citizen the means of livelihood. The Court was probably going on to the theory that the Executive Branch might possibly be stigmatizing a good citizen. It was concerned about that.

As I have said, the Court indicated, I believe, in its opinion, a statesmanlike approach, you should improve those procedures in

accordance with the American tradition. What is that tradition? Fair play.

We have picked up the Court's challenge, and when I say "we," we have had the aid of erudite attorneys like Mr. Walter Yeagley from Justice, White House attorneys, many attorneys throughout the Executive Branch, who have put their brains to work.

It took about 9 months of hard work to come up with the Executive Order and the regulations, all to the end of meeting the challenge of the Supreme Court, and always having in mind that we must use procedures which protect the national security—that is the paramount issue. In my judgment, that paramount issue is set forth specifically in section 9 of the Order, which says that in a particular set of circumstances, where the Secretary of Defense personally determines, because of the sensitivity of the situation, or the classified information, he cannot go to a full-scale hearing, it is his judgment, weighing the value of the individual and national interests that this individual on his own say-so shall not have access. I think this is in accord with our American tradition.

Mr. SCHERER. Now I think we should show for the record, then, what the evidence in the Greene case showed about Greene's background. I think it is important.

(Mr. Scherer, reading:)

During 1942 SUBJECT [Greene] was a member of the Washington Book Shop Association, an organization that has been officially cited by the Attorney General of the United States as Communist and subversive.

SUBJECT's first wife, Jean Hinton Greene, to whom he was married from approximately December 1942 to approximately December 1947, was an ardent Communist during the greater part of the period of the marriage.

During the period of SUBJECT's first marriage he and his wife had many Communist publications in their home, including the "Daily Worker"; "Soviet Russia Today"; "In Fact"; and Karl Marx's "Das Kapital."

Many apparently reliable witnesses have testified that during the period of SUBJECT'S first marriage his personal political sympathies were in general accord with those of his wife, in that he was sympathetic towards Russia; followed the Communist Party "line"; presented "fellow-traveller" arguments; was apparently influenced by "Jean's wild theories"; etc. * * *

In about 1946 SUBJECT invested approximately $1,000 in the Metropolitan Broadcasting Corporation and later became a director of its Radio Station WQQW. It has been reliably reported that many of the stockholders of the Corporation were Communists or pro-Communists and that the news coverage and radio programs of Station WQQW frequently paralleled the Communist Party "line." * * *

On 7 April 1947 SUBJECT and his wife Jean attended the Third Annual Dinner of the Southern Conference for Human Welfare, an organization that has been officially cited as a Communist front. * * *

Beginning about 1942 and continuing for several years thereafter SUBJECT maintained sympathetic associations with various officials of the Soviet Embassy, including Major Constantine I. Ovchinnikov—

I can't pronounce his name—and a number of other top Communists. I won't read on, but there are tendered specifications that get worse as you go on.

Mr. JOHANSEN. And is Mr. Greene now entitled——

Mr. SCHERER. Oh, he is entitled to classified information.

Mr. JOHANSEN. —entitled to access to classified information?

Mr. BARTIMO. May I clarify the record on that? Greene does not have access to classified information. The Supreme Court did not

order us to give him a clearance. The Supreme Court was very limited in its decision, and this is one reason why I have constantly characterized this decision as a statesmanlike decision. Greene does not have access.

Mr. JOHANSEN. How was the denial of that access accomplished in the face of the Court decision?

Mr. BARTIMO. The fact is that I don't believe the Supreme Court wants the Greene decision to be construed as having one arm of our three arms of Government telling another arm what it should mandatorily do. It has set out some criteria, some guidelines, some principles, which it believes should be followed. The Executive Branch has followed that. The Supreme Court never has indicated that the Executive Branch should give this individual access. The Supreme Court never made that determination.

As Mr. Scherer pointed out, there is probably a lot of information that would cause doubt in the Supreme Court's mind on this individual's ability to have access. All it was pointing out was that you should give this man, in accordance with our American tradition, a fair hearing. And this is what we seek to do.

If Greene came in today—if I may add this—and asked for access, we would give him these procedures.

Mr. SCHERER. But didn't the Supreme Court in the Greene case, by its decision, hold that he was illegally deprived of access?

Mr. BARTIMO. I believe that the Court held ——

Mr. SCHERER. That was the basis of the decision. That was the decision.

Mr. BARTIMO. But having arrived at that, it does not necessarily follow that we should give him access. I don't believe that follows.

Mr. SCHERER. Well, what actually happened in the Greene case, then?

Mr. BARTIMO. What happened in the Greene case?

Mr. SCHERER. Yes.

Mr. BARTIMO. The order that was written—and I don't have it. Do we have it with us?

Mr. MacClain participated in writing the order that implemented the Greene decision, and I believe he can straighten out your point, Mr. Scherer.

Mr. DOYLE. Now, in view of the fact that I referred to section 3, subdivision (1), and I asked a question, what sort of a right an applicant has—I stipulated, and I believe that certainly we are all agreed, that the Government has an absolute right to withhold any information wherein the national security is involved—but referring here again to subdivision (1), section 3, what right, if any—I think that was my wording—what right, if any, does a man have, in the first part of that section, or does he have a right? Is it a privilege, or is it a right, to be notified of what the complaint is? Is that a privilege that a man has? Is that all he has, or doesn't he have a right to be notified of anything that doesn't involve the national security? Or am I in error?

Mr. BARTIMO. Mr. Doyle, I think that what you are saying, as far as you are going, and what I believe you have in mind, you could characterize that as a right. However, we cannot take that and sep-

arate it from the whole ball of wax. As I have tried to indicate, and I believe that both Mr. Scherer——

Mr. DOYLE. I can see that, but you yourself said there was a line of cleavage some place.

Mr. BARTIMO. Yes.

Mr. DOYLE. Now where is that line of cleavage? Is it the line that you draw here in subdivision (1), section 3? Because there is a line of cleavage drawn there.

Mr. BARTIMO. No, I don't believe that is where I suggested that we might draw a line of cleavage. I think that if we just reiterate one or two points, and hope to clarify your point, which I think is a valuable point, we have agreed, and I believe you said so, Mr. Chairman, that section 9, which gives the Secretary of Defense the right, without regard to any hearings, to deny an individual, is a legal procedure.

Did I understand you clearly?

Mr. DOYLE. That is right.

Mr. BARTIMO. Now if that is correct, then it seems to me we are agreed with Mr. Scherer and Mr. Johansen, that so far, we are in agreement. Is that correct?

Now, then, where does the cleavage come? This word "cleavage"? I believe it comes where in the peculiar fact situation of Greene, this individual, peculiarly trained and equipped to work and make a livelihood in an industry which is monopolized by the defense contracts, which were classified—this was in effect what the Court said—where you had that peculiar situation, and you did not have what the Court termed a confrontation or a cross-examination type procedure, the Court found—and this is what it found—that the Department of Defense did not have authority to run this type of a procedure, either by the President or by the Congress, and this is all it found.

Now in trying to answer your question, on Mr. Scherer's point. The Supreme Court decision has been implemented to the effect that the record, so far as the final determination in Greene, is expunged. Therefore, you do not have on the record that Greene has been denied access. This doesn't necessarily, *ipso facto*, give him access.

For example—and I believe this point is very significant, and Mr. Doyle touched upon it—let's take a hypothetical case of a person who has been cleared in our program, and we suddenly come across information that this man is a saboteur planted in that particular industry by the Communists. We had not screened this, nor had we learned it in our investigative procedures. We have the right to immediately suspend this man from access to classified information so that he cannot do harm, without regard to procedures.

We would then give him a Statement of Reasons, setting forth our judgment of why we believe he is a saboteur, on the basis of the information available to us. Then he may take advantage of our procedures.

I believe, having that in mind, sir, I would welcome your judgment, that we have clarified the air about what we consider a privilege on the one hand, and a right on the other. I believe it reduces itself to semantics, but I believe men of good will, discussing these points, will arrive at what seems to me a logical solution, one which is necessary for us to protect our way of life.

Mr. JOHANSEN. Mr. Chairman, I still want to pursue one question. It may have been my lack of comprehension. Is Greene today deprived of his livelihood because he has not access to classified information? And if so, by what means—was it under this Executive Order, or by what means—did the Defense Department, subsequent to the Court's decision, deprive him of that access, or fail to grant him that access?

Mr. TAVENNER. May I interrupt a moment?

Mr. DOYLE. Let us suspend for a few minutes.

Mr. JOHANSEN. I do want to have the record show the answer to that question before we go.

Mr. SCHERER. Let me ask this. Didn't the Greene case finally determine that this man was improperly deprived of access to classified information?

Mr. BARTIMO. It did not. The Supreme Court opinion in my judgment did not reach that issue.

Mr. JOHANSEN. Well, what was the practical effect of it vis-a-vis Greene?

Mr. BARTIMO. The practical effect of the Greene decision was for us to pragmatically institute procedures which were in keeping with the Supreme Court opinion—I beg your indulgence on this if I am being repetitious—and the Court did not say that we have to give Greene access.

Now as to your question about what has happened to Greene since, I haven't followed Greene's career. I don't know what occupation he is engaged in, if any; but, nevertheless, I think the record ought to be clear that if Greene feels a necessity to have access to classified information, and wants to submit himself to our procedures, they are available.

Mr. SCHERER. He had it at the time. He had access to information, and the Greene case was to deprive him of it. He wasn't asking for it. He had it.

Mr. MACCLAIN. May I make a statement to clarify this?

Mr. BARTIMO. Mr. MacClain, I believe, might add here, Mr. Chairman.

Mr. MACCLAIN. Prior to the time when the Greene case reached the Supreme Court, there had been a series of actions in his case taken by the Department of Defense at one level or another. He had been deprived of the right of further access, long before his case ever reached the Supreme Court.

Mr. SCHERER. That is right.

Mr. MACCLAIN. As a result of the Supreme Court decision in that case, which didn't pass in any respect upon his eligibility for access in my judgment, the Court said that "the procedure that you used in the final analysis to pass upon this man's eligibility lacked authorization. The final result you reached, based upon this particular procedure, lacks validity. Wipe that out." We did. He is restored, then, to the position he occupied before that.

Mr. SCHERER. Entitled to access?

Mr. MACCLAIN. No, sir, not entitled. The action of the Secretary of the Navy, in notifying his employers to remove him from a position of access was, as we see it under the circumstances of his case, a sus-

pension type of action, and it has been and is our view that the Greene case does not reach a suspension type of exercise of authority by the Department of Defense. It is just as Mr. Doyle brought out and as the Secretary and Mr. Bartimo have brought out. Preliminary to this final action which was under the review of the Supreme Court, there had been preliminary actions, a suspension, an issuance of a Statement of Reasons, and an opportunity to go forward to a final type of personal appearance proceeding. This is what happened in his case, and as a result of the personal appearance proceeding which we gave to him, the Supreme Court found us in error, but they didn't go back, in our view, and undercut the preliminary actions that had been taken, and which were still in effect.

Mr. SCHERER. You say that Greene, then, didn't retain his right to classified information?

Mr. MACCLAIN. Oh, no, sir. The present situation is that, as far as he is concerned, on the books of the Department of Defense, the preliminary suspension as against him is still in effect. It has never been disturbed. The Court order that was entered pursuant to the Greene decision said that the final action taken in his case, and any proceedings based on that final action, are to be expunged as invalid. It did not reach any preliminary action whatsoever, and it was these preliminary actions which separated him from actual access, and that is where he is today.

Mr. JOHANSEN. Then he won, in terms of gaining or regaining access to classified information, a completely meaningless victory?

Mr. SKALLERUP. That is right.

Mr. BARTIMO. A Pyrrhic victory, if you will.

Mr. JOHANSEN. So that he does not as of now and has not since the decision had access?

Mr. MACCLAIN. That is right, sir.

Mr. DOYLE. Well, we will have to go to the Floor. We will be back again in about 15 minutes.

The committee will stand in recess.

Mr. TAVENNER. I suggest, sir, that we take more time now for lunch and come back at a quarter of two.

(Whereupon, at 12:50 p.m., Thursday, March 15, 1962, the committee was recessed to be reconvened at 1:45 p.m. of the same day.)

AFTERNOON SESSION—THURSDAY, MARCH 15, 1962

(The hearings were reconvened at 2 p.m., Mr. Doyle presiding.)

(Present also were Representatives Scherer, Johansen, Bruce, and Schadeberg.)

Mr. DOYLE. Let the meeting come to order, and we will proceed, counsel.

Mr. JOHANSEN. Mr. Chairman, I wonder if at this point I might direct a question to committee counsel.

Mr. DOYLE. Certainly.

Mr. JOHANSEN. I wonder, because there were some questions that were raised near the close of the morning session, whether you would very briefly highlight the issues, or more specifically the relief which Greene sought in his case, and also the decrees of the court, the Supreme Court to the lower courts, that emanated from the Supreme Court decision.

Mr. NITTLE. I have before me the Supreme Court report of the case of *Greene* v. *McElroy*. In the opinion, Chief Justice Warren recites the facts and the relief sought by Greene in that case.

Mr. SCHERER. What was the relief he sought?

Mr. NITTLE. He said this: After the Security Board decision in 1954, the petitioner—that is Greene—"filed a complaint in the United States District Court for the District of Columbia asking for a declaration that the revocation," that is, revocation of security clearance, "was unlawful and void and for an order restraining respondents from acting pursuant to it. He also asked for an order requiring respondents to advise" the employer "that the clearance revocation was void."

The Government filed a bill for dismissal of the complaint and for summary judgment, alleging presumably that there was no cause of action, and the district court granted the Government's motion for summary judgment.

On appeal to the United States Supreme Court, the final order is recited as follows: "Accordingly, the judgment is reversed and the case is remanded to the district court for proceedings not inconsistent herewith."

That is all that appears from the decision, but the assumption would seem to be that the district court was now obliged to enter a judgment to the effect that the revocation of security clearance was unlawful and void, to advise the employer of that fact, and restraining the respondents from acting pursuant to it.

Mr. SCHERER. That is the way I read the decision.

Mr. NITTLE. As a matter of fact, after the findings of the Security Board, it appears from the recital of the facts in the case that Greene was forced to resign from the offices he held in the corporation. I think he was vice president.

Mr. WALSH. And he was also discharged from his employment by the employer. That was the posture of the case.

Mr. JOHANSEN. You mean this was prior to the appeal?

Mr. NITTLE. Yes. He had resigned his offices and was discharged.

Mr. JOHANSEN. And this was in consequence of the Government's refusal to grant him clearance?

Mr. NITTLE. Yes, sir.

Now, I think this may be relevant to a clear understanding of the case: The Government seems to have acted entirely reasonably in its handling of the Greene case.

It forwarded to him a letter of charges and specifically set forth those matters of which it complained, and gave him an opportunity to respond. The Government also offered Greene an opportunity to present his witnesses; but the Government did not give him an opportunity fully to cross-examine or be confronted with all the witnesses against him, and indicated that it acted to a degree upon certain confidential information.

Mr. SCHERER. May I interrupt? The District Court held with the Government. The Circuit Court of Appeals affirmed. And the Supreme Court, when we get into this social consideration——

Mr. JOHANSEN. I take it the gentleman does not think the Supreme Court acted in a statesmanlike fashion.

Mr. SCHERER. Oh, I think it did not follow the basic law, as I was taught it in law school.

Mr. NITTLE. Certainly, the case presents one of the complex problems in the science of jurisprudence. It is something that has been troubling theorists for a long time.

Apparently the Supreme Court treated this matter as a case involving competing and perhaps conflicting interests and principles. The logic of the law pointed up but did not resolve the conflict. The Court then engaged in a balancing act—and suggested a sort of compromise.

Mr. JOHANSEN. May I come directly to the point? Since the Supreme Court's decree involved the issuance, as I understand it, by the lower court of an order restraining the Government from acting pursuant to its previous finding or ruling, what was the result of the matter; since the issue at stake seemed to be the restoration of employment, what was the result of the matter?

Mr. NITTLE. That does not appear from the case. The report of the case indicates only that the case was remanded to the District Court with orders to issue a decree in accordance with the decision.

Mr. JOHANSEN. I wonder if counsel can tell us whether such an order was issued, and what the consequences of it were, in terms of the status of Mr. Greene subsequent to his victory in the Supreme Court.

Mr. SKALLERUP. Mr. MacClain can answer.

Mr. MACCLAIN. The order was issued by the consent of both sides. The order directed itself against that portion of the proceedings in which Mr. Greene had been involved, which related to his having a personal appearance proceeding on the basis of which the final decision was entered revoking his access authorization, and the order declared that by virtue of the decision in the Supreme Court, the final action of revocation, which had been based on this particular personal appearance proceeding, was unauthorized, and therefore illegal and void, and was ordered and directed to be expunged.

Here is a copy of the order.

Mr. DOYLE. The order may be made a part of the record.

(The order follows:)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

DEC 1 3 1959

HARRY M. HULL, Clerk

WILLIAM LEWIS GREENE, :
:
Plaintiff, :
:
v. : Civil Action File No. 3561-58
:
NEIL McELROY, et al., :
:
Defendants. :

ORDER

Upon the decision of the United States Supreme Court in this case (Greene v. McElroy, 360 U.S. 474) and the copy of the judgment and opinion of the Supreme Court heretofore filed with the clerk of this Court; and

It appearing that counsel for the respective parties have consented hereto, it is hereby

ORDERED that the action of the Secretary of Defense and his subordinates in finally revoking plaintiff's security clearance was and the same is hereby declared to be not validly authorized; and it is further

ORDERED that any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked are hereby annulled and expunged from all records of the Government of the United States.

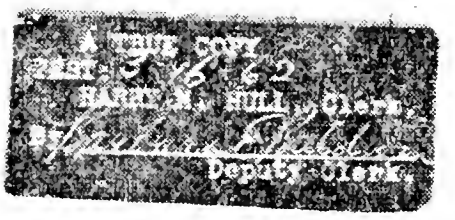
Dated: Dec 11, 1959

United States District Judge

Consented to:

Attorney for Defendants

Attorney for Plaintiff



Mr. JOHANSEN. Well, now, with the simplicity of a nonlegal mind, does that mean: Did he get his job back? Or didn't he?

Mr. MACCLAIN. I would answer your question in at least two steps.

Mr. JOHANSEN. Can you not answer that Yes or No?

Mr. MACCLAIN. We were not concerned with whether he got his job back in the sense that we could put him back in it, because we could not. We had not directed his discharge, and we could not put him back in his job, either one or the other.

As a matter of fact, according to information that I think is in the record before the Supreme Court, he never did return to the job that he had held prior to the time of this action.

Mr. SCHERER. May I interrupt there? Under the Supreme Court decision, he would have the right, as I understand it, to return to his job.

Mr. MACCLAIN. Sir, the language of the Supreme Court did talk about a job, a profession, employment, and that kind of thing. But the total effort of the Department of Defense was never directed toward his having or not having a job or employment or following his profession. It was directed to the single problem of whether he could have access or not.

Mr. SCHERER. I understand that. The result was the deprivation of a job.

Mr. MACCLAIN. The practical result was that his job was terminated.

Mr. JOHANSEN. Did not the Court go even further, and did it not say that the effect of the finding of the Government and the action of the Defense Department—that the actual effect of it—was to deprive him of his means of livelihood, not just this job, but the livelihood based on the career for which he had been professionally trained?

Mr. MACCLAIN. Well, sir, I do not disagree with what you have said, and I think words to that effect can be found in the Supreme Court decision. From the point of view of the Department, we were concerned with whether this man would or would not have access to classified information in one job or any other job, in one profession or any other profession. And the practical result of what happened to him may be looked at as the practical result. The objective that we had in mind was something else.

Mr. SCHERER. The question is, then, that you go back one step and say: Was not the result of the Supreme Court decision that the man was entitled to have classified information?

Mr. MACCLAIN. In our judgment, the answer to that question, sir, is No.

Mr. BARTIMO. May I read for the record the pertinent part of the decision? I read toward the end of the decision. I quote. And this is the majority view:

> In the instant case, petitioner's work opportunities have been severely limited on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure. The type of hearing was the product of administrative decision not explicitly authorized by either Congress or the President. Whether those procedures under the circumstances comport with the Constitution we do not decide. Nor do we decide whether the President has inherent authority to create such a program, whether congressional action is necessary, or what the limits on executive or legislative authority may be. We decide only that in the ab-

sence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job, in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.

Accordingly, the judgment is reversed and the case is remanded to the District Court for proceedings not inconsistent herewith.

And we have attempted to explain that the court order in the District Court, which was agreed to by counsel for Greene and the Government, was not inconsistent with the views I have just read you.

Mr. JOHANSEN. Has Greene—subsequent to this decision, in any way sought, by reason of any employment that he subsequently acquired, whether it was a result or not a result of this decision—has Greene at any time since this decision sought clearance for access to classified information?

Mr. SCHERER. He did not have to seek clearance. He had it. And this decision prevented the Government from taking it away from him.

Mr. JOHANSEN. All right. Has he had any employment under which he exercised the right alleged and ruled by the Supreme Court?

Mr. BARTIMO. I think I can help, here. Number one: To our knowledge, Greene has not sought employment within the United States which would necessitate access to classified information.

Mr. SCHERER. May I interrupt you there, counsel?

Mr. BARTIMO. Yes, sir.

Mr. SCHERER. If he did seek that, you could not deprive him of it, could you?

Mr. BARTIMO. My answer to that is: Yes, we could deprive him of it. We would offer him——

Mr. SCHERER. Under this decision?

Mr. BARTIMO. Under this decision. The Supreme Court has not—and if I may emphasize *not*—required the Executive Branch, the Government, to give him access to classified information. That is not what the opinion stands for, in our judgment. It is also the judgment, evidently, of his counsel, because he has not pressed us on that issue. I think it is further fortified from the order issued by the District Court.

Mr. SCHERER. I cannot follow.

Mr. JOHANSEN. I would like to hear counsel proceed. I think he was going to make a couple of other points.

Mr. BARTIMO. Yes.

On your point, Mr. Johansen, I think it is a little complex, and if you will bear with me for just a minute, I will try and explain it.

Under our procedures, as I illustrated by my hypothetical point this morning, where a man is cleared in industry through our procedures, and we finally discover he is a saboteur in the employ of a Communist oligarchy, we do not have to give him procedures. We can suspend him forthwith from access to classified information. We can pick up the telephone and do it immediately, to get him out of our classified area.

Now, let us assume that we have made a mistake. At this juncture, what has happened to this hypothetical individual? He has been suspended. That is in accordance with our procedures, and it is perfectly legal. The Supreme Court has not challenged us on this.

I would think the Supreme Court would agree that in carrying out our responsibilities to protect classified information we must have

the authority to suspend a known saboteur when such information comes to us without waiting months to decide. I do not think the Supreme Court would ever deny that right.

Having that point in mind, then you go to the next issue. This man has been denied access. He has been suspended.

Mr. SCHERER. Pardon me. Is that what you did in the Greene case?

Mr. BARTIMO. Yes, sir, we did that in the Greene case. The Secretary of the Navy, under the old procedures, suspended him. And just to pin home that point, Mr. Scherer, the Court decision did not affect our right to suspend. This issue was brought to a head during the District Court order in the Greene case.

Then the next step from the suspension is the so-called final determination. The final determination comes about after the procedure has been instituted. Before Greene when, as you know the procedures were a little different than they are now, as has been explained, where he got a full Statement of Reasons, where we considered the utmost that we could give him without affecting the national security.

True, as counsel has read, there were classified matters which we could not give him. But the Supreme Court issue went, I think, on a very narrow issue. It was a peculiar fact situation, as we explained this morning. It was a narrow holding.

And yet, in all due respect to Mr. Johansen, I think the Supreme Court was trying to be helpful. It was trying to point the way out to us, without meeting the constitutional issue, a method by which we could give a fair hearing and be within constitutional, legal grounds.

This I think we have done. This bill which you have before you would buttress what the Executive Branch has done by Executive Order and regulations, and, in my judgment, if another case similar to Greene's ever got before the Court, the Court would, I hope, give us an accolade that we have picked up its suggestions and now have proceedings which are fair and in the American tradition.

Mr. SCHERER. Why, then, did not Greene attack the suspension?

Mr. BARTIMO. I cannot answer you why Greene has not attacked the suspension.

Mr. SCHERER. Did not the decision entitle him, then, to another hearing on the suspension?

Mr. BARTIMO. Yes. And as Mr. George MacClain has just indicated by a note handed to me, we did actually offer Greene a proceeding, and he has not accepted it.

Mr. JOHANSEN. Now, what would that proceeding constitute or involve?

Mr. BARTIMO. The proceeding would constitute something like this, Mr. Johansen. If Greene came in to us and asked for a hearing, an appraisal of him as an individual as to whether he should have access to classified information would be made. We would bring his case up to date by investigation, at which time our experts, some of whom are here this morning, would set forth a Statement of Reasons as to why Greene should be denied access. He would have an opportunity, through counsel, with the aid of counsel, to answer our allegations, our Statement of Reasons, as to why we believe he should not have access.

Once these answers are in, they are reviewed for compliance with requirements as to form and sufficiency. If these requirements are

met, he has a right to a full scale personal appearance proceeding under the procedures described this morning. Thereafter, a final determination would be made.

Mr. JOHANSEN. And that procedure, then, would involve the right of confrontation and cross-examination?

Mr. BARTIMO. Under these procedures. And as you know, as Mr. MacClain and the Secretary explained this morning, we have certain caveats in our procedures; one dealing with the so-called confidential informant.

If it is a judgment of Mr. Hoover of the FBI and the Department of Justice, then this must be made by the Attorney General himself. If to reveal this confidential informer would be detrimental to our national security, the Attorney General issues a certificate to this effect.

By means of this procedure, the Government is entitled to use this evidence in appraising this particular individual. In such a case, as was pointed out this morning, the determination, the final judgment, must be made by the head of the Department concerned, in this case the Secretary of Defense.

Mr. JOHANSEN. May I ask one final question?

Possibly this is irrelevant, but under the situation you have described, and as I understand it, he is not now in Government service or in employment for a contractor involving Government contracts and involving classified information.

Precisely what was won for Greene in this decision? And I suppose there were some fairly ample legal fees.

Mr. BARTIMO. I think he won two things, if you can say he won. The record was expunged, so far as the Government was concerned, with respect to the final determination made before the new procedures.

Number two: He has earned a right or a privilege, whichever you will, to go before the Court of Claims, and ask for money damages.

Mr. MACCLAIN. I want to explain that Mr. Greene has not filed an action in the Court of Claims. Mr. Greene has been informed by the Department of Defense that at any time that he wishes, we will give him a proceeding under our present directive, under the Executive Order; and after that has been completed, we will give full consideration to any claim he may wish to file administratively.

If it should happen, as the result of these further proceedings, that he again is finally denied access authorization, we would not entertain his claim; but if he should win, and be determined currently eligible, we would then, if he filed a claim, address ourselves directly to the question of his entitlement to money.

Mr. JOHANSEN. How recently was that notification given to him? Would you recall?

Mr. MACCLAIN. Mr. Greene was notified almost directly after the issuance of our new regulation, last July, that this procedure was available to him, but even before that time, he was informed that as soon as we had a regulation, we would give him this opportunity.

Mr. JOHANSEN. Is there any terminal date to that offer?

Mr. MACCLAIN. No, sir.

Mr. JOHANSEN. They are necessarily open-ended?

Mr. MACCLAIN. That is right. Right now it is in his hands completely, and there is no cut-off date that I know of at all.

Mr. NITTLE. Should you not provide in the regulations for some cut-off date? After all, if too many years pass by, you may be handicapped in the presentation of your case, or evidence. Your witnesses may die, or they may go overseas, or something may occur. The memory may become dull. Would it not be wise to make some provision in the regulations for a cut-off date?

Mr. SKALLERUP. The regulations should contain some kind of provision relating to cutoff dates. Whether it would be put in terms of particular date, or particular time after the final judgment has been made, or whether it would be put in terms of "show cause why you have not filed sooner," or put on the merits, we just cannot say now, but certainly it would be a very important part of any regulation dealing with this.

Mr. JOHANSEN. Does the Defense Department's offer preclude his initiating action in the Court of Claims, if he elects to take that course?

Mr. SKALLERUP. That is a difficult legal issue.

Mr. JOHANSEN. I will withdraw it.

Mr. MACCLAIN. I would like to explain that it is always a matter of choice with Mr. Greene where he should go for his relief. And I am sure he would make a decision whether to go to the Court of Claims or not. But there are others who have gone to the Court of Claims, and their cases are pending there now. Not one of them has yet been decided. But in the two or three cases in which District Court orders were entered after Greene, none of the persons who had gone to the Court of Claims has obtained from the Department of Defense a determination of present eligibility.

And it is our position that until they at least have done that, they have no standing in the Court of Claims. Mr. Greene is up against that same proposition. We would assert it, I am sure, if he filed now.

Mr. JOHANSEN. I want to express my appreciation to the three gentlemen for your patience in getting me finally to understand the picture; and I appreciate my colleagues' patience.

Mr. BARTIMO. I think, Mr. Johansen, this has been a valuable discussion from the point of view of legislative history.

Mr. JOHANSEN. I think it contributes directly.

Mr. DOYLE. Counsel, are you ready to interrogate?

Mr. NITTLE. Yes, sir.

You have, Mr. Skallerup, given a very fine summary of your experience under this personnel security program, and you have discussed the question of the number of people who have been affected by personnel security procedures over some years past.

Since the adoption of Executive Order 10865, could you tell us specifically how many persons have in fact been deprived of employment in a particular defense industry who would otherwise have remained so employed except for the operation of these proceedings?

Mr. SKALLERUP. We have no information at all which would provide a basis for an answer to that question.

Mr. NITTLE. Do you have an estimate?

Mr. SKALLERUP. It would be most difficult to estimate, and perhaps I could explain why.

It is conceivable that in some instances, where individuals who have been denied access as a result of a complete hearing, have lost their em-

ployment. It is conceivable that in instances where individuals have been suspended from access and have chosen not to go forward with the proceeding, they may have left their employment. It is also possible that in some instances, in cases where these proceedings arise in the course of the man's probation period, he might be considered by his employer not the kind of person he would want to continue in permanent employment, and for that reason that person might lose employment.

Mr. NITTLE. Your statement discloses that under the present 1960 program you have had 800 cases which have come under the review program. Would that not indicate that there are at most less than 800 persons in the past two years who could have been deprived of employment as a result of the operation of these procedures?

Mr. SKALLERUP. Mr. Lewis reminds me that the 800 figure is the figure of total cases which have come into the industrial review program, and that of the 800—in answering your question, it would be a figure quite a bit short of 800, if all of those who had been denied were denied employment.

But I would like to point out that this denial of access is not *ipso facto* a denial of employment. It is a denial of access to information that is classified, and in some firms, where a small proportion of the employees are engaged in classified work, if the employer wants to continue using the services of that individual, he could use him in another part of the plant, where unclassified work is performed.

Mr. NITTLE. Yes. I think it important that you point out on the record, as you have done, that a denial of access to classified information does not necessarily result in a denial of other employment within the same industry.

Mr. JOHANSEN. It is not an automatic result, in other words.

Mr. SKALLERUP. That is correct.

Mr. NITTLE. Then at least we do have for the record a statement that there could not have been more than an average of 400 per year who would have been deprived of employment as a result of the operation of these procedures.

Mr. SKALLERUP. Mr. Lewis has come prepared with some figures, and I hope that his figures will result in a total which would reduce that 400 appreciably.

Mr. NITTLE. Yes. I was, of course, taking an upper limit. If there are only 800 security cases since 1960, and assuming that all of these persons were actually deprived of employment, the average figure at most would be 400 per year. And in the context of the operation of such a vast and important program, it seems that the number of individuals affected is very, very small in contrast with the importance of the program and the extent of its operation.

Mr. LEWIS. The Secretary this morning said that there were a total of approximately 800 cases since the activation of the new program on July 28th, 1960.

To begin with, 300 of those cases are still unresolved. Of the remaining 500, there were final denials of only 118. So the raw figure of possible losses of employment based on a final denial is 118; and since the Department of Defense policy, the public policy, is that the loss or denial of authorization does not require the contractor to terminate the employment of the individual, we have no reason to believe

that all of these 118 lost their jobs as a result of the denial. Some figure under 118.

Mr. NITTLE. So may the committee conclude, under those circumstances, that great care is obviously exercised by the Secretary of Defense to see that the employment of the individual is reasonably maintained, consistently with the national interest?

Mr. SKALLERUP. That is true, sir.

Mr. NITTLE. Perhaps we should state for the record that H.R. 10175 is intended to authorize the Secretary of Defense to provide regulations covering the entire range of security problems involved in the handling of classified information, and is not to be considered limited solely to subversive activities. It is also clear from the statements submitted by the Defense Department today that that has likewise been the objective of your draft bill.

Now, would you briefly summarize the area of security factors which are now specifically covered in existing regulations? That is, the basic principles upon which you grant or deny clearance.

Mr. SKALLERUP. The criteria?

Mr. NITTLE. Yes.

Mr. SKALLERUP. They are set forth in our regulation, and they appear in Department of Defense Directive No. 5220.6, dated July 28th, 1960, under Paragraph III, a copy of which was entered into the record. It appears at page 10 of the directive. And it sets forth the standard for issuing an access authorization, and then in detail describes the criteria for application of the standard in cases involving individuals.

There are 21 criteria set forth under Paragraph III of the directive which has been entered into the record.

Mr. NITTLE. Since the entire document has been entered in the record, your specific reference to that paragraph will be sufficient.

Mr. DOYLE. Is there any item or criteria that you wish you had in there?

Mr. BRUCE. Under 5, one of the criteria is "Intentional, unauthorized disclosure to any person of classified information, * * *"

What if a man made it unintentionally? Suppose, I mean, he was naive about it?

Mr. SKALLERUP. You mean careless or reckless in handling classified information?

Mr. BRUCE. Yes.

Mr. SKALLERUP. I believe that appears under Criterion 17, "Acts of a reckless, irresponsible or wanton nature which indicate such poor judgment and instability as to suggest that the individual might disclose classified information to unauthorized persons."

Mr. WALSH. What page is that?

Mr. SKALLERUP. This is page 12.

And 13, I would point out—"Willful violation or disregard of security regulations." And 14, "Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy."

Mr. SCHERER. Mr. Chairman, I would like to be excused. Another committee needs one more member to make a quorum, so that they can vote on a resolution.

Mr. TAVENNER. Will you be back shortly? We are putting you on another subcommittee.

Mr. SCHERER. About what time?

Mr. TAVENNER. I am hopeful that we could reach it about 3:30.

(Mr. Scherer left the hearing room.)

Mr. DOYLE. May I renew my question to the Secretary: Based upon your experience as to these 21 criteria, have you by experience found that you omitted something that you wished to put in there? If so, what?

Mr. SKALLERUP. There is one consideration which we are considering adding to this list of criteria. It relates to the willful failure to reply to official questions. It takes on the nature of an unwillingness to really cooperate with us in having a reasonable and timely resolution of matters pending. This is being considered as a possible addition to this list of criteria.

Mr. DOYLE. Does it involve his constitutional rights to plead the fifth amendment?

Mr. SKALLERUP. Pardon, sir?

Mr. DOYLE. Does it involve the area of his constitutional rights to plead his constitutional privilege and refuse to answer?

Mr. SKALLERUP. Well, this constitutional privilege would exist with respect to any one of the statements appearing in the Statement of Reasons.

Mr. DOYLE. Well, my question was directed to whether or not, by experience, you found you had left out something that you wished you had put in. That was the purport of my question. If so, what is it?

Mr. SKALLERUP. My answer was that what we are considering putting in would be another criterion, which would state that the willful refusal to answer questions set forth would be considered, along with all the other relevant factors in the case, in determining access.

Mr. JOHANSEN. Mr. Chairman, in that connection, under Item 21 of the criteria: "Refusal by the individual, without satisfactory subsequent explanation, to answer questions before a congressional or legislative committee," and so on—now, does the phrase "without satisfactory subsequent explanation" intend to convey that the explanation that I invoke the fifth amendment in my refusal to answer questions before this or any other member of the Congress—would that be regarded as a satisfactory subsequent explanation?

Mr. SKALLERUP. Would refusal on grounds of the fifth amendment be considered a satisfactory explanation for not replying?

Mr. JOHANSEN. That is right. In other words, would the invocation of the fifth amendment in response to a question as to whether the person had been or was a member of the Communist Party—would the invocation of the fifth amendment get him off the hook, so far as this 21st item is concerned?

Mr. SKALLERUP. No, the intention is quite the reverse. This would be considered as grounds upon which to deny access.

Mr. JOHANSEN. I am happy to hear that.

Mr. NITTLE. You will note that H.R. 10175, as well as your draft bill, adopts the procedure of authorizing reimbursement for loss of earnings to aggrieved applicants under certain equitable circumstances. Would such appropriation or application of funds toward reimbursement require congressional sanction?

Mr. SKALLERUP. We believe it does. The committee may be interested in some information with respect to the number of claims and

the size of claims, so that you have an idea of the size of the problem we are grappling with.

During the period since 1955, there have been on the average about 25 claims paid a year, and the average claim which has been paid runs just a little over $2,500.

Mr. JOHANSEN. These are claims based on what grounds?

Mr. SKALLERUP. These are claims which are based on grounds that the Government acted improperly in denying access or suspending an access authorization.

Mr. JOHANSEN. And he has lost pay as a consequence?

Mr. SKALLERUP. And he has lost pay as a consequence, and at the end of the line he was ultimately cleared.

And in the light of the whole record, is it not fair for the Government to reimburse him something for that loss of wages? It is that set of circumstances. But I would like to draw again the emphasis we place on the fact that before we will entertain a claim, the man must be cleared at the end of the line, must be granted access.

Mr. TAVENNER. Mr. Chairman, may I go back to an earlier question?

Mr. DOYLE. Go ahead.

Mr. TAVENNER. Reference was made to the use of the fifth amendment in refusing to answer a question. Is it not a fact that under the draft bill, in section 302, it is only in those cases in which the applicant controverts a matter contained in the reasons submitted, that the opportunity for examination and cross-examination and confrontation is applicable?

Mr. SKALLERUP. That is correct, Mr. Tavenner.

Mr. TAVENNER. I would think that that should clarify the question of the use of the fifth amendment.

Mr. SKALLERUP. A good point.

Mr. NITTLE. I call your attention to section 302 of your draft bill, particularly the opening clause, which establishes the power of the Secretary to except certain cases from the operation of the personal appearance procedures.

Is this power, which is vested in the Secretary to make exceptions to an appearance procedure, conclusive and final?

Mr. SKALLERUP. Are you speaking, sir, of the power which would be granted should this be enacted? Or are you speaking of powers of the Secretary as they are today?

Mr. NITTLE. As they are incorporated in the draft bill. I will read that opening clause.

Section 302 begins this way: "Except in cases where the Secretary personally determines that such procedures cannot be employed consistently with the national security * * *."

Then, with that exception, you establish the personal appearance proceeding to which an applicant will be entitled, with limited rights of confrontation and cross-examination.

In the draft bill you give the Secretary the power to make exceptions to that procedure when he personally determines that such procedures cannot be employed consistently with the national security.

Now, is that determination of the Secretary reviewable in any way?

Mr. SKALLERUP. It is not reviewable in any way under our industrial security review program. Whether such action of the Secretary might be reviewable in court is a matter that remains to be seen.

Mr. NITTLE. Do you envisage any requirement, to be implied or inferred in that language, that the Secretary, in making the determination of exception, shall give any Statement of Reasons underlying his determination that the appearance procedures cannot be employed consistently with the national security in a particular case?

Mr. SKALLERUP. No such requirements are intended.

Mr. NITTLE. Would you care to exemplify the type of cases where it is likely the Secretary may make such a determination?

Mr. MACCLAIN. I would like to give you a hypothetical situation which would illustrate that problem, sir. Please bear in mind this is hypothetical.

Let us suppose that back in 1950 to 1954, the applicant engaged in Communist Party activity. Available information shows that he was a member, that he was active, that he was a party man.

Then let us suppose that there is a period of time elapsing from 1954 until 1960, during which he is for all we know completely divorced from any party activity of any kind.

Let us suppose that back in 1950 to 1954, the applicant engaged in party activity, in and subsequent to 1960.

But let us suppose further that it is most important that he not know that this activity of his is known.

Now, in a situation of that kind, you could not possibly resolve the case by simply explaining the fact that back some years ago he was a member of the party. He would say, "Yes, of course, I was," perhaps.

But in the Statement of Reasons that we would want to give him, we could not, consistently with national security, tell him that this recent activity is now also in the picture. And since we could not tell him that, we could not really give him a Statement of Reasons which would really tell him what the case was about.

If this is a sensitive situation, involving classified information, we have only one way to go, and that is to the Secretary, to make an exception on these procedures.

Mr. NITTLE. Mr. Chairman, the staff has no further questions of the Department of Defense.

Mr. DOYLE. Are there any further questions?

The committee has no further questions.

I thank you, Mr. Skallerup, and your associates.

Mr. SKALLERUP. Thank you, sir.

Mr. NITTLE. Mr. Chairman, the committee invited the Department of Labor to submit its views upon H.R. 10175. They have not sent a personal representative here today, but have submitted a letter to the committee, dated March 12, 1962, under the hand of the Honorable Arthur J. Goldberg, Secretary of Labor, in which he supplies the views of the Department of Labor on H.R. 10175.

I ask that this be made a part of the record at this point.

Mr. DOYLE. Without objection, it will be so ordered.

(The letter follows:)

U. S. DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY
WASHINGTON

(BB)

MAR 1 2 1962

The Honorable Francis E. Walter
Chairman, Committee on Un-American
Activities
House of Representatives
Washington 25, D. C.

Dear Congressman Walter:

This is in further response to your request for a report on H.R. 10175, a bill "To amend the Subversive Activities Control Act of 1950 to provide for a security program with respect to defense contractors and their employees."

Although the Department of Labor does not administer any industrial security program, we of course have a great concern in this area under the Department's statutory responsibility with respect to the welfare of American wage earners. It is of the utmost importance that any industrial security program effectively protect the rights and interests of workers as well as of the Government, and it is clear that one of the most basic and important rights of an individual is that of being allowed to earn his livelihood.

As you know, the general area of H.R. 10175 is presently covered by Executive Order 10865, "Safeguarding Classified Information within Industry", issued February 20, 1960, and amended by Executive Order 10909 on January 17, 1961. This Executive Order was designed to counteract the decision of the Supreme Court in Greene v. McElroy, 360 U.S. 474, that the Defense Department's former industrial security program was authorized by neither statute nor Presidential directive insofar as it provided for the denial or revocation of security clearances of individuals in private industry.

The Executive Order spells out the rights of affected workers in substantial detail. It goes far to protect the essential rights of these persons, including their right to confront and cross-examine witnesses. Individuals whose eligibility for access to classified information is questioned must be given a written statement,

as comprehensive and detailed as national security permits, why their eligibility may be denied or revoked. They must be afforded an opportunity to reply in writing, to appear personally before the agency head, to prepare for that appearance, and to be represented by counsel. They are specifically given the right to cross-examine persons who have made statements respecting a controverted issue, subject to certain spelled-out limitations necessary to protect the national interest and the identity of bona fide confidential informants. When such a person may properly be denied the right to confront and cross-examine a particular witness under one of these limitations, he must be given a summary of the information which shall be as comprehensive and detailed as the national security permits. Comparable provisions apply to documentary material which cannot be inspected by the individual because it is classified.

In passing upon an applicant's request for access to classified information, the fact that he did not have an opportunity to cross-examine a particular witness must be taken into consideration and a final adverse determination may be made only by the agency head based on his personal review of the case. In addition, as much provision as possible, in the absence of the subpena power, is made to secure the appearance of witnesses at the proceeding and to make persons who have made adverse statements available for cross-examination by the applicant. Moreover, the Order specifically states that any adverse decision shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant.

H.R. 10175 provides for a personal appearance proceeding at which the person aggrieved shall be permitted to present evidence in his behalf, and at which the United States shall produce those persons who furnished adverse information to the extent that the Secretary of Defense and the head of the investigative agency that supplied the information shall determine to be permissible in the interest of national security. The subpena power would also be conferred upon the Secretary. These provisions, of course, recognize the existence of the rights of cross-examination and confrontation of witnesses. However, they leave entirely to the Secretary's discretion the determination of whether the national security

permits the production of witnesses, with no limitations along the lines of the Executive Order. In addition, the other rights conferred by the Executive Order (although they are doubtless contemplated) would have to be inferred because they are not mentioned in the measure.

It would appear preferable for industrial security programs to remain subject to Executive Order rather than statute, in order to retain flexibility to meet changing situations. If it should be determined that the national interest would best be served by providing a legislative foundation for such a program, we believe that the rights of workers subject thereto should be protected to the extent now provided by E. O. 10865. We think it vital that existing protections be maintained in full and not reduced or weakened in any fashion, particularly since the existing program appears to have operated successfully. Denial of security clearance may cost a worker his ability to support himself and his dependents, a consequence so fraught with irreparable harm that it should be permitted only under the strictest safeguards.

The Bureau of the Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Yours sincerely,

Arthur J. Goldberg

Secretary of Labor

STATEMENT OF J. WALTER YEAGLEY, ASSISTANT ATTORNEY GENERAL, IN CHARGE OF THE INTERNAL SECURITY DIVISION; ACCOMPANIED BY JOHN F. DOHERTY, FIRST ASSISTANT, AND KEVIN T. MARONEY, CHIEF, APPELLATE SECTION, DEPARTMENT OF JUSTICE

Mr. NITTLE. Mr. Yeagley, will you and your associates please come forward.

Mr. DOYLE. You are always welcome before the committee, gentlemen. We appreciate your coming.

Mr. NITTLE. Mr. Yeagley, would you kindly state your full name for the record, your official capacity, and the agency whose views you are authorized to present, together with the identification of your associates, and their official capacity?

Mr. YEAGLEY. Yes, sir. My name is J. Walter Yeagley, Y-e-a-g-l-e-y. I am Assistant Attorney General of the Department of Justice, in charge of the Internal Security Division, and my associates are Mr. John F. Doherty, my First Assistant, and Mr. Kevin Maroney, who is the Chief of the Appellate Section.

Mr. NITTLE. Do you have a statement for the committee in response to its request for the views of the Department of Justice?

Mr. YEAGLEY. Yes, I do have a statement.

(Mr. Yeagley reading:)

Mr. Chairman and members of the committee. I am pleased to appear at this hearing on behalf of the Department of Justice in response to your request for our views on H.R. 10175.

A sound industrial security program directed at the safeguarding of classified defense information in the hands of industry is a subject worthy of congressional interest and action.

It is, of course, necessary for the Government to entrust vital defense secrets to industry if we are to build and maintain a suitable defense posture.

In view of the constant effort of representatives of the Soviet bloc to ferret out such information, it is important that adequate provision be made for the protection of this data. An important part of this protective effort is to know the background of the people who are to have access to the information and to provide appropriate procedures for processing cases concerning the few who may be untrustworthy.

As you know, the Supreme Court, in the case of *Greene* v. *McElroy*, which has been discussed here today, and which came down on June 29, 1959, decided that the Department of Defense was not empowered to deprive Greene of his job in a proceeding in which he was not afforded the opportunity of confrontation and cross-examination in the absence of explicit authorization for such a hearing from either the President or Congress.

As a result of the Greene decision, Executive Order 10865, entitled "Safeguarding Classified Information Within Industry," was issued on February 20, 1960. Pursuant to this Executive Order, the Department of Defense on July 28, 1960, issued "Industrial Personnel Access Authorization Review Regulation," 25 Federal Register 7523

(1960), which sets forth procedures for implementing the industrial security program.

The principal problems arising from screening procedures that are directed at denying one access to classified information essential to his job are posed by the fifth and sixth amendments to the Constitution, particularly where the person is denied the right to cross-examine witnesses supplying the information against him.

In recent years, the courts have given considerable attention to the nature of the hearing and the right of cross-examination in governmental administrative actions that may stigmatize persons or deprive them of certain rights. If adverse information is to be considered without advising the applicant of its source or of its precise nature, while depriving him of the right to cross-examine the witness regarding its accuracy and his motivation, it becomes apparent that any safeguards in lieu of cross-examination that can be prescribed by the Government regarding the nature and reliability of the source and the probable accuracy of the information, would be most helpful in any litigation involving the constitutionality of the program.

We think that the procedures established by E. O. 10865 adequately protect the national security and at the same time in cases where cross-examination of a witness is not possible provide the maximum safeguards possible toward assuring the reliability of the source and the accuracy of the information.

Executive Order 10865 provides that an applicant shall have the opportunity to cross-examine persons who have furnished adverse information concerning him, except:

(1) Where the head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest; in the case where an FBI informant is involved, this means a certificate signed personally by the Attorney General; or

(2) The head of the department concerned or his special designee for that particular purpose has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and the head of the department or such special designee has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (A) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (B) due to some other cause determined by the head of the department to be good and sufficient.

If I may note here, No. 1 relates to information from informants, confidential informants, and No. 2 relates to information from other sources.

Mr. JOHANSEN. May I interrupt at that point?

Mr. YEAGLEY. Yes, sir.

Mr. JOHANSEN. I think this was discussed with the previous witnesses, but could you give us your understanding of the meaning of 2(B) "Due to some other cause determined by the head of the department to be good and sufficient"? How broad and inclusive and sweeping is that?

Mr. YEAGLEY. First of all, I do not believe that it was intended to be broad and sweeping, for the reason that the authority is placed at the level of the head of the department. He is a busy man, and they are not going to be able to take many matters of this kind up with him. It would therefore have to be in the exceptional and rare case.

It was a sort of exception, I believe, that was placed in this Order for a very rare and unusual situation that the Secretary might feel warranted no other action but this one particular exception.

And I cannot off-hand give you an example—I believe we could at a later time—of the type of a rare case that might fall properly into such a classification.

When the Government is compelled to rely on one of these exceptions, the applicant should be given a summary of the Statement of Reasons which must be as comprehensive and detailed as the national security permits. Appropriate consideration shall be accorded to the fact that the applicant did not have an opportunity to cross-examine such a person or persons, and a final determination adverse to the applicant shall be made *only* by the head of the department, based upon his personal review of the case.

The Executive Order also contains provisions for the reception in evidence and consideration, subject to rebuttal, of physical evidence—other than investigative reports, both classified and unclassified—without authenticating witnesses.

We think this Executive Order provides a sound and workable program, and that it should be given a chance to perform the function for which it was intended.

I understand that a rather sizable number of personal appearance proceedings, with full opportunity of cross-examination, have been held.

In any legal test regarding the nature of the hearing, it would, of course, be desirable for the program to be supported by both Executive Order and congressional authorization in view of the language in the Greene decision. However, we doubt the advisability of making changes of substance or procedure at this time.

H.R. 10175 does not mention E.O. 10865. That bill would provide legislative authority for the Secretary of Defense to prescribe security safeguards for the protection of classified information in connection with the performance of contracts of the United States which involve classified information, without full cross-examination. It affords the right of cross-examination in access hearings "to the extent that the Secretary, and the head of the investigative agency, if any, which supplied the information, shall determine to be permissible in the interest of national security."

Upon closer examination from the standpoint of a possible test in court, we note that the bill does not require that the applicant be informed prior to the hearing of the nature of the information he is expected to refute. It seems to permit the Government to take into consideration the entire investigative file, which might include infor-

mation from sources of unknown reliability, anonymous letters and opinions of others, with no requirement that the applicant be advised of the nature of the information that may form the basis for an adverse determination.

For the foregoing reasons, the Department of Justice does not endorse H.R. 10175. It does support the view that it would be desirable to have congressional authorization for the present program under E.O. 10865 and provisions relating to the payment of witnesses similar to Section 5A(d) of H.R. 10175.

That concludes my statement.

Mr. DOYLE. Thank you, Mr. Yeagley.

Any questions, counsel?

Mr. NITTLE. Mr. Yeagley, I presume you have examined the draft bill of the Defense Department which was presented here this morning.

Mr. YEAGLEY. Yes, I have. It has not been processed elsewhere in our Department, nor have we commented to the Bureau of the Budget.

Mr. NITTLE. Does the draft bill in your opinion meet the requirements you have pointed out in your statement, and does it provide a sound basis for legislation?

Mr. YEAGLEY. We think that it is a good bill, well drafted. It covers practically all of them. But there are a few points, I think, that should be noted, that is, points of difference, that to my mind, raise a question as to the standing of Executive Order 10865, in the event such a bill is passed without reference to the Executive Order.

I am not prepared to say now that it would revoke the Executive Order, but it is different in some respects, and it does not endorse or ratify or affirm the Executive Order, and that would raise a question, I believe.

First of all, I don't find in the bill a criterion to be used by the Secretary in denying access. In other words, it is not clear whether it is in the national interest, which is in the case of the Executive Order, or if it is a security standard such as in the interest of national security.

I do not think there is a criterion in the bill to form the basis for a decision, although I understand from the people in the Department of Defense that they would under this bill reissue their present regulations.

Mr. JOHANSEN. Now, so the record will be completely clear, at this juncture, and speaking of this bill, you are speaking of the revised draft bill proposed by the Defense Department?

Mr. YEAGLEY. That is correct.

The standard in Executive Order 10865, if I recall, was a standard general in nature, but nonetheless a standard in the national interest, I believe, or in the interest of the United States, without the word "security" being involved.

It is a broad standard, and it was purposely drawn that way, partly because of the desire to avoid stigmatizing the person who is denied access, that the Defense Department people mentioned earlier. If a man is denied access because he is not a good security risk, this could be considered perhaps stigma, in the language of the Court in some of its cases. The standard in the Executive Order now is clearly consistent with the national interest.

I think the only other point I should note is that the Order provides for the head of the investigative agency to issue the certification regarding an informant who is not available to testify.

We have not talked with the FBI about this recently. They were present at discussions, of course, involving a draft of the Executive Order; and at that time it was their definite feeling that they did not want to be in a position of furnishing the information and then also making the determination as to whether or not they would permit cross-examination of the informant, or whether they would withhold it as secret information. They felt that the head of the Department should make this determination, and not the agency that gathers the information. Consequently, under the Executive Order, the head of the Department supplying the information makes that determination now, and I believe that the FBI would probably favor the same position today, although we have not talked to them about this draft of the proposed bill.

Now, this has been prepared within the last few days, and we have had revised copies as they were changed. For this reason, it has not been processed elsewhere in the Department, not even in my own office. I have read it. I have made those few observations. We would want, if it is introduced, to have the usual opportunity for departmental comments on the bill.

Mr. NITTLE. Would you comment briefly on what may be your views as to the necessity of maintaining a security program, of the type set up in the Executive Orders and the regulations of the Defense Department?

Mr. YEAGLEY. Well, there is no doubt in my mind that there must be adequate procedures and regulations with the proper authority behind them, set up to protect these secrets that must be passed out to industry if industry is to manufacture weapons or missiles or space craft or other items relating to our national defense. Some of them involve developments of the greatest secrecy; yet they must become the knowledge of from hundreds to thousands of Americans who are employees in defense industry.

We know, from the material we get, largely from the FBI, of course, of the constant activity aimed at obtaining American secrets, particularly of a technical nature, of industrial know-how, new inventions, new processes in defense weapons. These efforts come from many quarters. And we cannot assume that the millions of Americans involved are all adequately prepared and capable of protecting the information that may come to them, so some check must be made.

I do not know that any serious question can be raised of the need to have some protection for this information that goes out in great volume to a few million people.

Mr. NITTLE. The bill under consideration and the draft bill of the Defense Department are, of course, not confined solely to subversive activities. However, based upon your experience and your present office, would you agree with the statement the chairman made this morning: "It may be taken as factual that the Communists have succeeded in serious degree in accomplishing their planned infiltration of basic industry"?

Mr. YEAGLEY. If that implies that they have succeeded in doing what they wanted to do, I would have to take some exception to that,

because their goals are considerably higher than what they have attained.

I certainly agree with the point that the chairman makes, that one of the major points of infiltration by the Communist Party in this country since its origin over 40 years ago has been basic industry, and they have constantly made that one of their important targets.

The only small exception I take is that I believe their goals are considerably higher than their attainment.

Mr. NITTLE. That may well be. But there is no question in your mind, based upon your experience and your sources of information, that the Communists have infiltrated basic industry?

Mr. YEAGLEY. Yes.

Mr. JOHANSEN. May I interject at that point?

And is there any question in your mind as to the persistent determination and desire to accomplish that result?

Mr. YEAGLEY. No, I have no question as to that.

Mr. JOHANSEN. Constituting an always present and serious actual and/or potential internal danger to the United States?

Mr. YEAGLEY. Absolutely. They had that as a goal before they developed such a concern about acquiring technical secrets. That goal was a part of the class struggle, infiltration of industry.

Mr. JOHANSEN. And therefore that is part of a domestic threat, as opposed to an external threat?

Mr. YEAGLEY. Not if I understand you. The threat comes from the fact that the information will end up in an external——

Mr. JOHANSEN. I recognize that the destination is external; but the existing threat in this area is an internal threat within the United States?

Mr. YEAGLEY. Yes, espionage and matters related to that have been one of the most important security problems that the Government has faced over recent years in relation to the Soviet bloc.

Mr. NITTLE. Based upon your knowledge and experience, do you find that members of the Communist Party of the United States are disposed, and indeed required by the principles of their association, to commit sabotage and espionage under appropriate circumstances?

Mr. YEAGLEY. Yes, sir.

Mr. NITTLE. The chairman quoted from the testimony of Mr. John Lautner, who indicated that a high Communist Party official rendered a secret report to the party when Lautner was likewise a high official in the party, and boasted that by 1948, over 3,000 Communist Party branches throughout the country, and between 400 and 500 industrial branches, had been established.

Would you care to comment upon that testimony of Mr. Lautner?

Mr. YEAGLEY. No. I do not think that I could add much to that. I know John Lautner, of course. He has been a witness who has been used by our lawyers in some of our cases. If he testified to that as of 1948, I would assume that he had reasonably accurate figures upon which to base his statement. I do not know of anything to contradict it, as of that date.

Mr. NITTLE. As of that period.

Now, as of the present time, without asking you to disclose any matters of confidence, would you be able to say that in general there are at least a few hundred industrial branches of the Communist Party established in American industry?

Mr. YEAGLEY. This, of course, is an investigative problem. We do not have investigators of our own. We get our information from the FBI. I would not want my answer to be taken necessarily as factual. It would have to be my opinion for what it is worth.

And I would concur in your statement, from the best judgment I can make.

Mr. NITTLE. Would you care to express your views as to the constitutionality of the personal appearance proceedings set up in the Defense Department draft bill, which provide for a limited confrontation and cross-examination proceeding?

Mr. YEAGLEY. If I may do that by basing my comment on the Executive Order, which I have had a great deal more to do with, having previously noted the few differences between the bill you speak of, the draft bill, and the Executive Order, I would rather do it from that basis, because I feel like I have a better familiarity with the Executive Order.

Mr. NITTLE. Yes.

Mr. YEAGLEY. I believe, and we believe, that in an appropriate test case in the Federal courts, the constitutionality of such a proceeding could be sustained in the Supreme Court.

This is a guess. I hope it is an educated guess.

We participated with Defense and the White House in preparing the Executive Order, and tremendous man-hours of study and research went into this, to determine what was required legally, constitutionally, and what was required from the standpoint of the interests of national security, and a great number of men, lawyers, investigators, and administrators, did their best to prepare a workable and fair order. After hearing the testimony of the people from the Defense Department today on the success they have had under the Order, I believe we could sustain it, although it would not be without some difficulty.

Mr. NITTLE. We would also like your opinion as to the necessity for a limited type of proceeding, such as is established in that Executive Order.

Would it be inconsistent with the interests of national security to require a full hearing in all security cases, with absolute rights guaranteed to confrontation and cross-examination—in all cases?

Mr. YEAGLEY. I did not get the first part of the question, sir. Would it be required? Would it be inconsistent?

Mr. NITTLE. Would it be inconsistent with the interests of national security to require a full hearing, with full confrontation and cross-examination?

Mr. YEAGLEY. Yes, I believe it would be inconsistent with the best interests of security particularly if it required the production or uncovering of informants regardless of their potential. There is language in court opinions, in recent years, that the employee may suffer some detriment from an adverse determination, or perhaps some stigma or loss of job, in which case he could have a right to have some opportunity to find out if there is error in the charges or in the allegations against him, or find out if the source is one that holds malice toward him. He may have a right under our constitutional system to some fair proceeding in order to protect himself. And this would have to, of course, be weighed in the light of what was the Government's objective or the Government's needs. If the Govern-

ment has a vital area that it has to protect, and if there is a threat to our Government, as there is today, then the Government also has an important interest.

The court does what is called a balancing of the interests. If there is a constitutional right, or some sort of a right of the individual employee that may be infringed, the question then might be whether the interest of the Government is an overriding interest, and was maximum protection afforded to the employee under the circumstances?

If he is deemed to be entitled to a regular, full hearing with complete right to confrontation and cross-examination, this would mean that the Government would have a choice, one of two choices, to make, in such a case.

It would have the choice of letting a potential agent retain his job if the Government chooses to withhold a confidential informant that it cannot reveal or uncover on the witness stand. The Government may not be able to afford to release an informant in every instance. He may be a vital part of Government coverage in a certain area.

The choice would be to uncover the informant and lose the coverage in future months or years in that area in order to produce him as a witness to be cross-examined, or to keep quiet about the informant and about the information it has on Mr. X, and let Mr. X proceed in his employ.

Therefore I should add, I suppose, that if it is a full confrontation hearing, the country's best security interests cannot be provided for.

I would like to observe, however, that I was greatly impressed, as I imagine many of you were, with the statistics that the Defense Department people have presented today, to show the large number of cases in which full confrontation was possible and was provided; and that only in a very, very few cases, an extremely small percentage, a fraction of a percentage, has it been necessary to consider the use of an Attorney General's certificate in lieu of a live witness.

Mr. DOYLE. Is there any question from the committee members?

Mr. BRUCE. I have none.

Mr. DOYLE. Mr. Johansen, do you have a question for our distinguished witness?

Mr. JOHANSEN. Mr. Attorney General, I was particularly interested in and impressed by your comments indicating that you do regard this situation as a present and continuing potential source of danger. I would just like to make a comment, and then, if you care to, you can comment on it.

There was published in the *New York Times* on February 22nd of this year one of the periodic paid ads urging that the Congress abolish this committee. That is only incidental to the point I want to make and the comment I want to make.

And one of the reasons alleged in this ad was that it caused us to neglect settlement of problems in our foreign relations field—that was the implication—or abroad, and attempted to concentrate attention on the minuscule Communist movement in this country.

It is very interesting to note that one of the signers of this ad was Mr. Russell Nixon, who has been in previous hearings identified before this committee under oath as a Communist, and a man who I understand until recently was with a union that was referred to in the hear-

ings this morning, and was the subject of hearings in the Pittsburgh area several years ago.

It seems to me not irrelevant that in view of the concern that you have expressed in this area of national security, and in view of your very clear testimony with respect to the existing and always potential internal danger that we are addressing ourselves to, it is sufficient just to call attention to this calculated and deliberate effort, the effort to abolish the committee, for my purposes, being incidental, but this deliberate and calculated effort, subscribed to by one man, who is obviously a party in interest, to totally minimize any threat on the part of the Communist Party in the United States.

I just wondered if you would like to comment on that.

Mr. YEAGLEY. I did not see the advertisement you speak of. I do not recall it now. I imagine that you gentlemen here have more detailed knowledge than I do of your critics. Particularly if you are doing something, you have critics.

I am not sure that I get the exact point of your question.

I would like to observe, however, that the lawyers in my office are the lawyers that represent the House Committee on Un-American Activities and the Senate Internal Security Subcommittee in the courts when you desire to pursue contempt of Congress charges against witnesses, and I have had the job, and I must say the pleasure, to participate in some of those cases myself.

So we have a great familiarity with the committee, what it does, what it has done, how it works, and also to some extent with the critics. We have been meeting, I think, with increasing success, and I hope it continues.

Mr. JOHANSEN. Well, my point goes not to criticism of the committee; my point goes to the fact that here, as a part of this campaign, we have the evidence of the continuing campaign to minimize the existence of any internal threat so far as the Communists are concerned, and one of the advocates of that doctrine is a man who, on the basis of sworn testimony before this committee, has a considerable and obvious interest in minimizing it. That is the point I wanted to make.

Mr. YEAGLEY. As far as I know, all Communists would join with him, if they had the courage and the opportunity, to criticize this committee, as well as the other one.

Mr. JOHANSEN. That is all I have.

Mr. DOYLE. Mr. Yeagley, I noticed you made a brief observation in answer to Mr. Johansen's question as to the possible degree or extent to which the Communist conspiracy or Communist Party activities were internal, that is, within our own domestic confines. I was interested particularly in your answer, which was very brief, wherein you mentioned that the information went to external sources. Could you elaborate on that some, please? Because I am aware of frequent communications these days, from constituents and others, which claim that our Government is not paying any attention, or enough attention, to the Communist conspiracy within our own domestic confines, and too much to it in other parts of the world.

Now, if you have any opinion on the extent to which the Communist movement still operates within our domestic territory, as compared with the outside, I would appreciate it.

Mr. YEAGLEY. I do not know if I can make clear my own feelings on this, but it is an important area, I think. We, too, get a great deal

of correspondence from the public. I am not sure that we are able to express ourselves or explain it adequately. And of course our position may be wrong.

It seems to me, at least, that the great problem today, the great danger, not only to us, to this country, but to humanity itself, comes from this tremendous international Communist movement, as principally represented by the Soviet bloc. That is to me the danger. It could cause a tremendously destructive nuclear war that might wipe out humanity, or most of it, certainly civilization as we know it today. That threat is one that is almost beyond human comprehension. And to me this is the real big danger, the real big problem. It is right there.

The Communist Party in this country, the same as the Communist Party in any country, is not only an agent of that group, but is part and parcel of the Soviet bloc and the international Communist movement. They are all members of the same crowd, with the same objectives.

They may claim and be able to establish American citizenship, but as far as I am concerned, for the most part that is a paper documentation, and what they have in their hearts and their minds is what concerns us. I can only consider them to be as much a part of this international threat as a member of the Communist Party in the Soviet Union would be, and that if they had the opportunity here, they would do as much for the Soviet movement.

After all, the members of the Communist Party are not newly become Communists. What we have in this country today are the hard-core, old-time Communists that are left after the party has fallen in membership by many, many thousands over the years, and those that are left today are really hard-core, devoted Soviet-bloc Communists, international Communists, as I see it.

Mr. BRUCE. Mr. Chairman, may I interject there, and ask a question on that?

Is it not a tactic of an internal Communist Party to narrow down and get rid of the soft flesh, as it were, at times of real crisis, so that the numbers can be a misleading evaluation of the strength of the Communist movement? Would that be correct?

Mr. YEAGLEY. Yes, that could be correct. They as you know have had their purges, and they have times when they have membership drives, and other times when they do not.

The answer to your question is yes, sir. It could be correct.

Pardon me. I might add one point. It is a part of this same area.

I do not want to leave the impression that when one of us in the Department may speak in terms of approximately how many Communists there are in this country, that that means necessarily that we are certain that those who left the party have left permanently. We do know this: that many of them who have left are not talking about it. They are not talking about what they used to do. They are not cooperating with the Government. There may be others, so-called bandwagon Communists, that might be glad to jump back on if conditions become more appropriate for that.

So figures, as you say, are interesting and useful, but their significance sometimes is a bit elusive.

Mr. BRUCE. There is, as you know, a great deal of controversy, and this is what we have been dealing with for the last few minutes, about

this diversionary argument, of whether the strength or the danger of the Communist Party is internal or external. And if I am interpreting what you have said correctly, you are saying that it is one and the same, that you cannot separate internal and external, that it is the Communist worldwide conspiracy, which is a faith in a military operation and an economic operation, and that the Communist Party in any given country, the United States, Mexico, or anywhere else, is a danger in direct proportion to the world Communist movement, being under the discipline thereof.

So actually it is a nice diversion for us to set ourselves one against the other on whether the danger is internal or external. It is a total danger that comprises both, because they are one and the same. The danger is the world Communist movement. And their agent in any given country is the Communist apparatus.

Is that correct?

Mr. YEAGLEY. Yes. I would like to add that some who have commented on this have perhaps a different idea in mind in discussing that relationship, and being primarily interested in the political capability of the group in any given country.

Mr. BRUCE. But it is true that they have built a good deal of their military strength as a result of their disciplined apparatus within the United States. They short-circuited their atomic research necessities with their espionage system and many other advances, where they could leapfrog over some of the painful experimentation as a result of the success of their apparatus within our society.

That would be correct, would it not?

Mr. YEAGLEY. Oh, yes. They have made, I suppose, considerable use out of their espionage network, as we know from the Klaus Fuchs case and the Rosenberg case. There is no doubt about that.

Mr. NITTLE. Mr. Chairman, may I ask the witness a few additional questions?

Mr. DOYLE. Yes, indeed.

Mr. NITTLE. I believe the Attorney General was quoted in the newspapers some weeks ago, Mr. Yeagley, as indicating that the Communist Party membership was now about 10,000.

Am I correct in that statement?

Mr. YEAGLEY. I did not see that. You could be correct. I did not see that.

Mr. NITTLE. Have you made any public pronouncements as to the present membership of the Communist Party?

Mr. YEAGLEY. I have made some statement about my opinion as to the membership.

Mr. NITTLE. Would you indicate that for the record, please?

Mr. YEAGLEY. I am not quite sure what I said, but I believe it was approximately 8,000.

Mr. NITTLE. Now, when you give the figure of membership of 8,000, are you referring simply to what might be called formal membership? A moment ago you indicated that several thousand Communists have left the party; but there was some doubt as to whether they were continuing their sympathetic association with it and following its line. Now, when you referred to a membership of 8,000, are you referring to what might be called the formal membership?

Mr. YEAGLEY. Not quite. I do not believe the Communist Party knows what its formal membership is. It is not that precise, I do not believe. And so I am not claiming that my figure has any particular accuracy, except that it is indeed the best judgment I can make on the material I have seen currently, as compared to what I used to see when I was in the FBI a good many years ago. And it is frankly not based on formal membership, but on what I think is an accurate figure of people who today would consider themselves to be Communists.

Mr. BRUCE. On that, sir, has not Mr. Hoover somewhat qualified the use of a figure on this with the rest of a statement which so often is forgotten, that for every one of these, there are ten others ready, willing, and able to carry out the bidding of the Communist Party? So according to his statement, you would almost have to multiply the official figure that is given by ten?

Mr. YEAGLEY. Yes, he has said that, I think, on more than one occasion.

Mr. NITTLE. Communist Party publications have a circulation and a paid circulation far in excess of the membership figure which you have given?

Mr. YEAGLEY. That is correct.

Mr. NITTLE. It may be true that some of these Communist publications are circulated to certain Government agencies and other non-Communists for intelligence or research purposes, but certainly not to the extent of the several thousand indicated by the paid circulation of these newspapers in excess of the membership figures you have given. *The Worker* has a circulation, a paid circulation, I believe, of 15 or 20 thousand on the East Coast. *The People's World* has a circulation of over 6,000 on the West Coast. There are other Communist publications circulated to the extent of several thousand more. There is an indicated paid circulation of possibly 30,000 and more.

Who are these people that are reading these publications?

Are these people loyal Americans, or are they Communists in sympathy with, and following the propaganda line of, the Communist Party and its policies and therefore engaging in the sabotage of American policy in that way?

I mean to ask: Do we not minimize the extent of Communist action in this country when we say the membership is just 8,000?

Mr. YEAGLEY. I think the figures you have given on subscriptions may well be correct. I do not know. This is an area which we, as law enforcement people, do not get into so much, because this is obviously in the area of freedom of the press, and until recently, we had no legitimate concern with the publications as violating any of our laws.

Mr. NITTLE. There is a violation of the law if Communist publications are not labeled under the Internal Security Act.

Mr. YEAGLEY. Since this order became final, of the Subversive Activities Control Board, as a result of the Supreme Court action, we do now have an interest in any publication that is disseminated by the Communist Party, being appropriately labeled. They are not in violation of law so long as they label it. That is all that is required. They do not have to go out of business. But if they fail to label, and if we can establish a case in court, then they would be subject to criminal prosecution.

You may have noted from the press recently that we have begun a grand jury investigation here in the District of Columbia to determine whether *The Worker*, for example, should be labeled, and who could be prosecuted for failure to label.

The contempt action this week against James E. Jackson, who is the editor of *The Worker*, was not merely a case of some Government lawyers snooping into the freedom of the press, at all. It was a case of the law stating that a publication must be labeled, disseminated by blank, a Communist organization, if in fact it is so disseminated. And *The Worker*, we believe, fell into that category, at least so as to require a grand jury investigation. The Acting Attorney General authorized a grand jury investigation into this area as a part of our responsibility to enforce the law.

Mr. NITTLE. Of course, I want to remain clear on the record that we by no means suggest that freedom of the press should be interfered with. My questions were not put to you with that thought in mind, but I noted the circulation of Communist publications as somewhat of a gauge to determine the number of Communists within the country who follow the party line, but who may not be formal members or organizationally active.

Now, certainly in the mid-1940's, I think Mr. Hoover announced that there were in excess of 50,000 Communist Party members at that time. Then followed, of course, a series of prosecutions under the Smith Act by the Justice Department, and membership in the party fell off.

Now, does one suppose that these people ceased being Communists, or did they simply sever formal membership for the purpose of avoiding prosecution?

Mr. YEAGLEY. Yes, that was the point I was raising a bit earlier.

Mr. TAVENNER. Mr. Chairman, since the questioning has gotten into this area, it might be pertinent to make this comment: That a seriously considered estimation of the number of persons in the United States today who have been members of the Communist Party reaches the astounding figure of 700,000. No one knows how many of those persons left the Communist Party through conscience or conviction, and no one knows how many of that great number are out only organizationally speaking.

Mr. SCHERER. May I ask one question?

Do you feel, Mr. Yeagley, that there is adequate legislation on the books to enable the Government to deal effectively with potential espionage agents or saboteurs in defense plants?

Mr. YEAGLEY. Well, we are recommending today that legislation supporting the present industrial security program would be useful. If we had both an Executive Order and legislation, it would fortify us in the courts.

The question you raise also involves what I believe we used to call the defense facilities protection bill. And I think this one you referred to today has been received in the Department of Justice, if I am not mistaken, and I believe it is under consideration. I have not seen the present draft. I know we have not commented on it.

There has been a little water over the dam, judicially speaking, since the position we took 5 years ago. I regret that I do not know our answer to your question as of this moment.

Mr. SCHERER. You are not able to say whether the Justice Department feels the need of such legislation, as you did 4 or 5 years ago?

Mr. YEAGLEY. There may be a need. I do not know, in view of the legal problems involved, what our comments will be. I really have not read the bill, and I have not thought in terms of the rest of industry as compared with this particular area we are discussing today.

Mr. SCHERER. I was not thinking in reference to the specific terms of a specific bill.

Mr. YEAGLEY. I can only put it this way: that we know that there are a great many people here who are Communists. We know where their loyalties are, and not only that, but their interests and their hopes and their desires. If they are in an area that is sensitive, where they have access to information, I would have to assume they are going to pass it on.

Mr. SCHERER. I was not exactly talking about information. I believe you were in the room this morning when I used the illustration of a security risk or a potential saboteur working in a utility plant which is in support of a defense plant. Do you have any legislation to deal with this fellow? Suppose you find out that he had actually studied, taken courses in sabotage, and he is in a position to pull a switch in a utility plant or power plant supplying electricity to one of our defense plants. There is nothing you can do about it, is there——

Mr. YEAGLEY. This gets into an area, just off-hand, of what this man may intend to do or possibly do in the future from the standpoint of sabotage. Of course, there are many plants that have had security surveys over the years, for the very purpose of protecting their facilities; so that a very, very limited number of people can get into the type of an area you are speaking about.

But I am sure this must not be the case in every situation.

Mr. SCHERER. You do not have any legislation whereby you could remove such an individual from that sensitive position today, whether he is in a support plant or whether he is actually in a defense plant?

And I am not talking about classified information. I am talking about protection of, say, weapons, missiles.

Mr. YEAGLEY. I do not know that we have anything at all. Neither do I know that this question has been posed to us as an actuality; so that we have probably never studied this precise question. We have had no cases of this kind.

Mr. SCHERER. The Defense Department has testified on a number of occasions since I have been a member of this committee, and consistently since 1950 has asked for legislation to meet this particular problem which I posed.

Mr. YEAGLEY. Yes, I believe the Department of Justice testified in 1957 on a bill of that type, or at least on a problem very closely related to that.

Mr. SCHERER. I think you approved a bill that was submitted to the Defense Department, if my recollection is correct.

Mr. YEAGLEY. I believe we testified either for the objective of the bill or for the bill itself. I am not quite clear on it, but we did testify here at that time.

Mr. SCHERER. I think such a bill is just as important as this legislation to protect classified information. As far as I have been, I have

not been able to find anything whereby we might deal effectively with a situation such as that which I have outlined.

The Defense Department said they were going to give consideration to it. I would certainly appreciate it if the Justice Department would review its position on this.

Mr. YEAGLEY. Fine. Yes, we intend to.

Mr. DOYLE. Any other questions, Counsel?

Mr. NITTLE. No, sir.

Mr. DOYLE. Any other questions by members of the committee?

We thank you, Mr. Yeagley, and your associates. We appreciate your being in the hearing room all day with us.

Mr. YEAGLEY. Yes, Mr. Chairman. Thank you.

Mr. DOYLE. We are sorry we had to make you wait so long.

Mr. YEAGLEY. That is all right.

Mr. DOYLE. Is there any other matter to come before the committee?

Mr. NITTLE. There are no further witnesses to be presented on this bill, Mr. Chairman.

Mr. DOYLE. Then the committee will stand adjourned on this particular bill.

(Whereupon, at 4:00 p.m., Thursday, March 15, 1962, the committee adjourned subject to the call of the Chair.)

APPENDIX

EXHIBIT NO. 1

EXECUTIVE ORDER 10865

SAFEGUARDING CLASSIFIED INFORMATION WITHIN INDUSTRY

WHEREAS it is mandatory that the United States protect itself against hostile or destructive activities by preventing unauthorized disclosures of classified information relating to the national defense; and

WHEREAS it is a fundamental principle of our Government to protect the interests of individuals against unreasonable or unwarranted encroachment; and

WHEREAS I find that the provisions and procedures prescribed by this order are necessary to assure the preservation of the integrity of classified defense information and to protect the national interest; and

WHEREAS I find that those provisions and procedures recognize the interest of individuals affected thereby and provide maximum possible safeguards to protect such interests:

NOW, THEREFORE, under and by virtue of the authority vested in me by the Constitution and statutes of the United States, and as President of the United States and as Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

SECTION 1. (a) The Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, and the Administrator of the Federal Aviation Agency, respectively, shall, by regulation, prescribe such specific requirements, restrictions, and other safeguards as they consider necessary to protect (1) releases of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of, contracts with their respective agencies, and (2) other releases of classified information to or within industry that such agencies have responsibility for safeguarding. So far as possible, regulations prescribed by them under this order shall be uniform and provide for full cooperation among the agencies concerned.

(b) Under agreement between the Department of Defense and any other department or agency of the United States, including, but not limited to, those referred to in subsection (c) of this section, regulations prescribed by the Secretary of Defense under subsection (a) of this section may be extended to apply to protect releases (1) of classified information to or within United States industry that relate to bidding on, or the negotiation, award, performance, or termination of,

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contracts with such other department or agency, and (2) other releases of classified information to or within industry which such other department or agency has responsibility for safeguarding.

(c) When used in this order, the term "head of a department" means the Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, the Administrator of the Federal Aviation Agency, and, in sections 4 and 8, includes the Attorney General. The term "department" means the Department of State, the Department of Defense, and the Atomic Energy Commission, the National Aeronautics and Space Administration, the Federal Aviation Agency, and, in sections 4 and 8, includes the Department of Justice.

SEC. 2. An authorization for access to classified information may be granted by the head of a department or his designee, including but not limited to, those officials named in section 8 of this order, to an individual, hereinafter termed an "applicant", for a specific classification category only upon a finding that it is clearly consistent with the national interest to do so.

SEC. 3. Except as provided in section 9 of this order, an authorization for access to a specific classification category may not be finally denied or revoked by the head of a department or his designee, including, but not limited to, those officials named in section 8 of this order, unless the applicant has been given the following:

(1) A written statement of the reasons why his access authorization may be denied or revoked, which shall be as comprehensive and detailed as the national security permits.

(2) A reasonable opportunity to reply in writing under oath or affirmation to the statement of reasons.

(3) After he has filed under oath or affirmation a written reply to the statement of reasons, the form and sufficiency of which may be prescribed by regulations issued by the head of the department concerned, an opportunity to appear personally before the head of the department concerned or his designee, including, but not limited to, those officials named in section 8 of this order, for the purpose of supporting his eligibility for access authorization and to present evidence on his behalf.

(4) A reasonable time to prepare for that appearance.

(5) An opportunity to be represented by counsel.

(6) An opportunity to cross-examine persons either orally or through written interrogatories in accordance with section 4 on matters not relating to the characterization in the statement of reasons of any organization or individual other than the applicant.

(7) A written notice of the final decision in his case which, if adverse, shall specify whether the head of the department or his designee, including, but not limited to, those officials named in section 8 of this order, found for or against him with respect to each allegation in the statement of reasons.

SEC. 4. (a) An applicant shall be afforded an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relating to a controverted issue except that any such statement may be received and considered without affording such opportunity in the circumstances described in either of the following paragraphs:

(1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(2) The head of the department concerned or his special designee for that particular purpose has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and the head of the department or such special designee has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (A) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (B) due to some other cause determined by the head of the department to be good and sufficient.

(b) Whenever procedures under paragraphs (1) or (2) of subsection (a) of this section are used (1) the applicant shall be given a summary of the information which shall be as comprehensive and detailed as the national security permits, (2) appropriate consideration shall be accorded to the fact that the applicant did not have an opportunity to cross-examine such person or persons, and (3) a final determination adverse to the applicant shall be made only by the head of the department based upon his personal review of the case.

SEC. 5. (a) Records compiled in the regular course of business, or other physical evidence other than investigative reports, may be received and considered subject to rebuttal without authenticating witnesses, provided that such information has been furnished to the department concerned by an investigative agency pursuant to its responsibilities in connection with assisting the head of the department concerned to safeguard classified information within industry pursuant to this order.

(b) Records compiled in the regular course of business, or other physical evidence other than investigative reports, relating to a controverted issue which, because they are classified, may not be inspected by the applicant, may be received and considered provided that: (1) the head of the department concerned or his special designee for that purpose has made a preliminary determination that such physical evidence appears to be material, (2) the head of the department concerned or such designee has made a determination that failure to receive and consider such physical evidence would, in view of the level of access sought, be substantially harmful to the national security, and (3) to the extent that the national security permits, a summary or description of such physical evidence is made available to the applicant. In every such case, information as to the authenticity and accuracy of such physical evidence furnished by the investigative agency involved shall be considered. In such instances a final determination adverse to the applicant shall be made only by the head of the department based upon his personal review of the case.

SEC. 6. Because existing law does not authorize the Department of State, the Department of Defense, or the National Aeronautics and

Space Administration to subpena witnesses, the Secretary of State, the Secretary of Defense, or the Administrator of the National Aeronautics and Space Administration, or his representative, may issue, in appropriate cases, invitations and requests to appear and testify in order that the applicant may have the opportunity to cross-examine as provided by this order. So far as the national security permits, the head of the investigative agency involved shall cooperate with the Secretary or the Administrator, as the case may be, in identifying persons who have made statements adverse to the applicant and in assisting him in making them available for cross-examination. If a person so invited is an officer or employee of the executive branch of the Government or a member of the armed forces of the United States, the head of the department or agency concerned shall cooperate in making that person available for cross-examination.

SEC. 7. Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.

SEC. 8. Except as otherwise specified in the preceding provisions of this order, any authority vested in the head of a department by this order may be delegated to the

(1) Under Secretary of State or a Deputy Under Secretary of State, in the case of authority vested in the Secretary of State;

(2) Deputy Secretary of Defense or an Assistant Secretary of Defense, in the case of authority vested in the Secretary of Defense;

(3) General Manager of the Atomic Energy Commission, in the case of authority vested in the Commissioners of the Atomic Energy Commission;

(4) Deputy Administrator of the National Aeronautics and Space Administration, in the case of authority vested in the Administrator of the National Aeronautics and Space Administration;

(5) Deputy Administrator of the Federal Aviation Agency, in the case of authority vested in the Administrator of the Federal Aviation Agency; or

(6) Deputy Attorney General or an Assistant Attorney General, in the case of authority vested in the Attorney General.

SEC. 9. Nothing contained in this order shall be deemed to limit or affect the responsibility and powers of the head of a department to deny or revoke access to a specific classification category if the security of the nation so requires. Such authority may not be delegated and may be exercised only when the head of a department determines that the procedures prescribed in sections 3, 4, and 5 cannot be invoked consistently with the national security and such determination shall be conclusive.

DWIGHT D. EISENHOWER

THE WHITE HOUSE, *February 20, 1960.*

[F.R. Doc. 60-1735; Filed, Feb. 23, 1960; 11:51 a.m.]

Exhibit No. 2

Executive Order 10909

AMENDMENT OF EXECUTIVE ORDER NO. 10865,[1] SAFEGUARDING CLASSIFIED INFORMATION WITHIN INDUSTRY

By virtue of the authority vested in me by the Constitution and statutes of the United States, and as President of the United States, and as Commander in Chief of the armed forces of the United States, Executive Order No. 10865 of February 20, 1960 (25 F.R. 1583), is hereby amended as follows:

Section 1. Section 1(c) is amended to read as follows:

"(c) When used in this order, the term 'head of a department' means the Secretary of State, the Secretary of Defense, the Commissioners of the Atomic Energy Commission, the Administrator of the National Aeronautics and Space Administration, the Administrator of the Federal Aviation Agency, the head of any other department or agency of the United States with which the Department of Defense makes an agreement under subsection (b) of this section, and, in sections 4 and 8, includes the Attorney General. The term 'department' means the Department of State, the Department of Defense, the Atomic Energy Commission, the National Aeronautics and Space Administration, the Federal Aviation Agency, any other department or agency of the United States with which the Department of Defense makes an agreement under subsection (b) of this section, and, in sections 4 and 8, includes the Department of Justice."

Sec. 2. Section 6 is amended to read as follows:

"Sec. 6. The Secretary of State, the Secretary of Defense, the Administrator of the National Aeronautics and Space Administration, the Administrator of the Federal Aviation Agency, or his representative, or the head of any other department or agency of the United States with which the Department of Defense makes an agreement under section 1(b), or his representative, may issue, in appropriate cases, invitations and requests to appear and testify in order that the applicant may have the opportunity to cross-examine as provided by this order. Whenever a witness is so invited or requested to appear and testify at a proceeding and the witness is an officer or employee of the executive branch of the Government or a member of the armed forces of the United States, and the proceeding involves the activity in connection with which the witness is employed, travel expenses and per diem are authorized as provided by the Standardized Government Travel Regulations or the Joint Travel Regulations, as appropriate. In all other cases (including non-Government employees as well as officers or employees of the executive branch of the Government or members of the armed forces of the United States not covered by the

[1] 25 F.R. 1583.

foregoing sentence), transportation in kind and reimbursement for actual expenses are authorized in an amount not to exceed the amount payable under Standardized Government Travel Regulations. An officer or employee of the executive branch of the Government or a member of the armed forces of the United States who is invited or requested to appear pursuant to this paragraph shall be deemed to be in the performance of his official duties. So far as the national security permits, the head of the investigative agency involved shall cooperate with the Secretary, the Administrator, or the head of the other department or agency, as the case may be, in identifying persons who have made statements adverse to the applicant and in assisting him in making them available for cross-examination. If a person so invited is an officer or employee of the executive branch of the Government or a member of the armed forces of the United States, the head of the department or agency concerned shall cooperate in making that person available for cross-examination."

SEC. 3. Section 8 is amended by striking out the word "or" at the end of clause (5), by striking out the period at the end of clause (6) and inserting "; or" in place thereof, and by adding the following new clause at the end thereof:

"(7) the deputy of that department, or the principal assistant to the head of that department, as the case may be, in the case of authority vested in the head of a department or agency of the United States with which the Department of Defense makes an agreement under section 1(b)."

DWIGHT D. EISENHOWER.

THE WHITE HOUSE, *January 17, 1961.*

[F.R. Doc. 61-567; Filed, Jan. 18, 1961; 2:08 p.m.]

EXHIBIT NO. 3

July 28, 1960
NUMBER 5220.6

ASD(MP&R)

Department of Defense Directive

SUBJECT Industrial Personnel Access Authorization Review Regulation

Reference: (a) DOD Directive 5220.6, entitled "Industrial Personnel Security Review Regulation," dated February 2, 1955, as amended (cancelled)

I. GENERAL

A. Authority

This Regulation is issued pursuant to the authority vested by law, including Executive Order 10865 (reproduced as Appendix A), in the Secretary of Defense.

By an exchange of letters between the Secretary of Defense and the Administrators of the Federal Aviation Agency and the National Aeronautics and Space Administration, and as provided for in Section 1 (b), Executive Order 10865, the Department of Defense has been authorized to act for and in behalf of the Federal Aviation Agency and the National Aeronautics and Space Administration in the performance of the administrative and personnel services set forth in this Regulation. Reference (a) is hereby cancelled.

B. Purpose

1. The Secretary of Defense and the Administrators of the Federal Aviation Agency, and the National Aeronautics and Space Administration have prescribed specific requirements, restrictions, and other safeguards which they consider necessary to protect (a) releases of classified information to or within United States industry that relate to bids, negotiations, awards, or the performance or termination of contracts with their department or agency, and (b) other releases of classified information to or within industry which their department or agency has responsibility for safeguarding. In this connection, this Regulation prescribes uniform standards,

criteria, and procedures for processing to final determination all cases which come within the scope of the Industrial Personnel Access Authorization Review Program.

2. Pursuant to the agreement made between the Department of Defense, and the Federal Aviation Agency, and the National Aeronautics and Space Administration, (provided for in Section 1 (b), Executive Order 10865), this Regulation has been extended to apply to protect the releases of classified information specified in subparagraph 1., above. The Boards and instrumentalities provided for in this Regulation are hereby authorized to assume jurisdiction over, and as hereinafter provided, to process and make determinations in cases arising out of such releases of classified information.

3. This Regulation is issued to conform the Industrial Personnel Access Authorization Review Program to the requirements of Executive Order 10865.

C. Definitions

1. Whenever the words "Department of Defense", or "Department of Defense agency or activity", or "military department" are used herein, they shall be deemed to include where applicable the Federal Aviation Agency, or the National Aeronautics and Space Administration.

2. Access Authorization: An authorization to have access to one or more categories of information classified in accordance with Executive Order 10501. (NOTE: Actual access, when authorized, requires both an access authorization and a "need to know".) In the case of a contractor, an "access authorization" is an authorization for the contractor involved to have access to specific categories of classified information provided such access is (a) required in connection with the bidding, negotiation, award, performance, or termination of contracts with a Department of Defense agency or activity or (b) required in connection with other releases of classified information to or within industry. In the case of a contractor employee, an "access authorization" is an authorization for the employee to have access to specific categories of classified information provided such access is (1) required for the performance of his work with a particular contractor on contracts with a Department of Defense agency or activity or (2) required in connection with the release of classified information to or within industry.

3. Administrator: The Administrator of the Federal Aviation Agency, or the National Aeronautics and Space Administration.

4. Agency case: A case arising out of the release of classified information to or within industry directly by the Federal Aviation Agency or the National Aeronautics and Space Administration in connection with the bidding, negotiation, award, or performance or termination of a contract by one of those agencies.

5. Applicant: Any person who is eligible to have the matter of granting, revoking, or denying him an access authorization determined or reconsidered under the Industrial Personnel Access Authorization Review Program as provided for in paragraphs I.F. and V.B.

6. Contractor: An industrial, educational, commercial, or other entity which has executed a contract or a Department of Defense Security Agreement (DD Form 441) with a Department of Defense agency or activity.

7. Personal appearance proceeding: A proceeding before the New York, Washington, or Los Angeles Industrial Personnel Access Authorization Field Board convened and conducted in accordance with this Regulation. The use of the terms "personal appearance proceeding" or "proceeding" in this Regulation does not imply, and shall not be construed to mean, that such procedures are subject to the provisions of the Administrative Procedure Act, or that the rules of evidence customary in the courts of the United States shall be applied.

D. Policy

1. The responsibilities of the Department of Defense, including those imposed by the President in Executive Order 10865, necessitate application of policies designed to minimize the possibility of compromise incident to placing classified information in the hands of industry. Adequate measures will be taken to insure that no person is granted, or is allowed to retain, an authorization for access to classified information unless the available information justifies a finding that such access authorization, at the specific classification category granted, is clearly consistent with the national interest.

2. A determination that granting or retaining authorization for access to information of a specific classification category is not clearly consistent with the national interest shall result in denying or revoking authorization for such access. Any determination under this Regulation adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the

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loyalty of the applicant concerned. A determination under this Regulation favorable to an applicant is not, in and of itself, an access authorization; nor is it in any sense a determination that the applicant concerned actually requires access to classified information. Since an access authorization relates only to access to classified information, denying or revoking such an authorization does not preclude participation in unclassified work.

3. In the absence of the power to subpoena witnesses, the Secretary of Defense, through the Director, Office of Industrial Personnel Access Authorization Review, may issue in appropriate cases invitations and requests to appear and testify, and may defray reasonable and necessary expenses incurred by such witnesses, in order that the applicant may have the opportunity for cross-examination provided by this Regulation. So far as the national security permits, investigative agencies under the control of the Department of Defense shall cooperate by identifying to the Office of Industrial Personnel Access Authorization Review, persons who have made statements adverse to the applicant and by assisting in making such persons available for cross-examination.

4. All personnel involved in the processing of cases under the Industrial Personnel Access Authorization Review Program shall comply with the applicable directives pertaining to the safeguarding of classified information and the handling of investigative reports. No classified information, nor any information which might compromise investigative sources or methods or the identity of confidential informants, shall be disclosed to any applicant, or to his counsel or representatives, or to any other person not authorized to have access to such information. In cases involving individual applicants, the employer concerned may be advised only of the final determination in the case and of any interim decision to suspend an access authorization previously granted. Except at the written request of the applicant, the Department of Defense shall not release copies of the Statement of Reasons or findings relative thereto outside of the Executive Branch of the Government.

E. Program

The Industrial Personnel Access Authorization Review Program is hereby revised, modified, and continued in accordance with this Regulation. The Program shall be administered by the Director, Office of Industrial Personnel Access Authorization Review, who shall have a staff for that purpose. The Office

of Industrial Personnel Access Authorization Review shall consist of the following elements:

1. The Office of the Director.

2. The Industrial Personnel Access Authorization Screening Board (hereinafter called the Screening Board).

3. The Industrial Personnel Access Authorization Field Boards (hereinafter called the Field Boards).

4. The Central Industrial Personnel Access Authorization Board (hereinafter called the Central Board).

F. Scope of Program

1. Except as provided in subparagraph d. of this paragraph the procedures established in this Regulation shall be applicable to cases in which the applicant is eligible under the Armed Forces Industrial Security Regulation for consideration as to the granting or continuing of an access authorization and in addition thereto:

   a. A Department of Defense agency or activity has recommended that an access authorization of a contractor or contractor employee be denied or revoked;

   b. A Department of Defense agency or activity has suspended an access authorization of a contractor or contractor employee;

   c. A Department of Defense agency or activity has denied or withdrawn a temporary access authorization from an individual, other than a foreign national, who falls within such categories as may be established under this subparagraph; or

   d. Action is requested by the Secretary of Defense, or the Secretary of any military department or the Administrator concerned.

2. Once access authorization has been suspended, or a Statement of Reasons has been issued, or a temporary authorization for access has been withdrawn or denied in the case of applicants included in categories established under subparagraph 1., above, these procedures may be invoked by an applicant even though his employment has been terminated.

II. ORGANIZATION

A. Office of Industrial Personnel Access Authorization Review

1. Organization

a. The Office of Industrial Personnel Access Authorization Review shall be established in the Office of the Secretary of Defense and will function under the administrative jurisdiction of the Assistant Secretary of Defense (MP&R). The Office shall be headed by a civilian Director appointed by the Secretary of Defense after consultation with the Assistant Secretary of Defense (MP&R) and the Secretaries of the Army, Navy and Air Force. Policy guidance for the operation of the program including manpower and personnel requirements shall be provided by the Assistant Secretary of Defense (MP&R). The Director shall be responsible for administering the Industrial Personnel Access Authorization Review Program, including its constituent boards; he shall advise and consult with the Secretaries of the Army, Navy and Air Force in carrying out this responsibility. He shall be responsible for ensuring that the Screening, Field and Central Boards are provided with such advice, assistance and personnel, including legal and security advice, as he considers necessary to enable these elements properly to carry out their functions under this Program. He shall have such professional, technical, and clerical staff as he may require to carry out his responsibilities, as set out herein, and such other related responsibilities as may be prescribed. The Director is authorized to obtain information, assistance, and advice directly from any agency or activity of the Department of Defense, and, in accordance with established policies, from other agencies of the Government. He shall prepare monthly reports showing caseloads and the status of pending cases. The Director may issue such supplemental instructions, not inconsistent with this Regulation, as may be desirable for the administration and efficient operation of this Program, including rules for the processing of cases, the conduct of screenings, personal appearance proceedings, determinations and reviews, and for guidance in the application of the standard and criteria set forth in paragraph III. In any particular case, the Director may request additional investigation to be made subject to the provisions of any agreements with investigative agencies outside the Department of Defense.

b. The Office of Industrial Personnel Access Authorization Review shall be located in the Pentagon and shall be

supported administratively by the Office of the Secretary of Defense. The military departments shall make appropriate allocations of funds, military and civilian personnel, and personnel spaces.

c. Communications shall be addressed to the Director, Office of Industrial Personnel Access Authorization Review, The Pentagon, Washington 25, D. C.

2. Department Counsel

The Office of Industrial Personnel Access Authorization Review shall include within its staff a sufficient number of qualified attorneys, who may be stationed in Washington, D. C. or at such other locations as the Director may select, to act as counsel for the Department of Defense in each case in which a personal appearance proceeding is held under this Regulation. When designated by the Director to serve in this capacity, department counsel shall perform the functions normally and customarily associated with said position. Department counsel shall also advise and assist the Screening Board as required, and shall represent the Department of Defense before the Central Board when appropriate.

3. Files

The complete files of all review cases pertaining to industrial personnel shall be maintained by the Department of the Army.

B. Industrial Personnel Access Authorization Screening Board

1. The Screening Board shall be located in the Office of Industrial Personnel Access Authorization Review and shall be responsible for the performance of the duties and functions hereinafter prescribed.

2. The Secretary of each military department shall appoint one or more members, military or civilian, to the Screening Board as the caseload requires. Appropriate officials designated by each Secretary will submit nominations through the Director, who will review the qualifications of each nominee and make an appropriate recommendation to the Secretary concerned. Except as provided in paragraph II.F., any three members so appointed, one from each military department, shall constitute a quorum-panel so that more than one panel may be convened at the same time. The Director shall designate one member to serve as Chairman of the Screening Board.

3. The Screening Board shall have jurisdiction over all cases which are referred to it in accordance with this Regulation.

C. Industrial Personnel Access Authorization Field Boards

1. There shall be three field boards, which shall be known as the New York, the Washington and the Los Angeles Industrial Personnel Access Authorization Field Boards and which shall be located in said cities. Additional field boards may be established by the Director with the approval of the Secretaries of the Army, Navy and Air Force. Panels of existing Field Boards may be convened at other locations to provide prompt and convenient personal appearance proceedings. Each Field Board shall be responsible for the performance of the duties and functions hereinafter prescribed.

2. The Secretary of each military department shall appoint one or more members, military or civilian, to each Field Board as the caseload requires. Appropriate officials designated by each Secretary will submit nominations through the Director, who will review the qualifications of each nominee and make an appropriate recommendation to the Secretary concerned. The Director shall designate either one member of the Board or a staff member to serve as administrative director of each Board who will be responsible for the immediate operations of the Board. A quorum-panel may consist of any one civilian member who is a qualified attorney, or of any three members, one from each military department, of whom at least one shall be a civilian and at least one shall be a qualified attorney. When a panel of three members is convened, the administrative director shall designate one member to act as Chairman. A quorum-panel may exercise all of the authority conferred on the Board or Chairman by this Regulation.

3. Each Field Board will have jurisdiction over all cases referred to it in accordance with this Regulation.

D. Responsibilities of Military Lepartments for Administrative Support

1. Except as provided in paragraph 2., the Field Boards shall be supported administratively by the following military departments, which shall appoint such other personnel as may be required by the Director to assist each Field Board:

New York Industrial Personnel Access Authorization Field Board
Department of the Army

Washington Industrial Personnel Access Authorization Field Board
Department of the Air Force

Los Angeles Industrial Personnel Access Authorization FieldBoard
Department of the Navy

2. Whenever, pursuant to direction of the Director, a panel of a Field Board established under paragraph II.C.1., above, is convened at any of the following named locations, the commanders named, respectively, shall arrange or provide for the administrative support needed by such board panel in order to discharge its official business at such locations:

Alaska:
Commander, Alaskan Air Command

Virgin Islands, Canal Zone, and Puerto Rico:
Commanding General, USA, Carribean

Guam, American Samoa, Wake, Midway, Guano Island & Hawaii:
Commandant, 14th Naval District

3. Where a panel of a Field Board is convened at a location other than its principal office or at a location outside the jurisdiction of the commanders named in paragraph 2., above, the military department requested by the Director shall provide office space, facilities and clerical personnel for each personal appearance proceeding and for the prompt making of a verbatim transcript thereof.

4. As a verbatim transcript will be required of each personal appearance proceeding before a Field Board, it is the responsibility of each of the above mentioned commanders to provide the necessary personnel and facilities for the prompt making of such transcripts.

E. Central Industrial Personnel Access Authorization Board

1. There is hereby established a Central Board, which shall be located in the Office of Industrial Personnel Access Authorization Review, and shall be responsible for the performance of the duties and functions hereinafter prescribed.

2. The Secretary of each military department shall appoint one or more members, military or civilian, to the Central Board as the caseload requires. Appropriate officials designated by each Secretary will submit nominations through the Director, who will review the qualifications of each nominee and make an appropriate recommendation to the Secretary concerned. The Director shall designate one member to serve as Chairman of the Central Board. Except as provided in paragraph II.F., any three members so appointed, one from each military department, shall constitute a quorum-panel so that more than one panel may be convened at the same time. One of the members of each quorum-panel must be a qualified lawyer and each quorum-panel shall include at least one civilian.

3. The Central Board shall have jurisdiction over all cases referred to it in accordance with this Regulation.

F. Composition of Boards in Agency Cases

1. Whenever an agency case is referred for consideration and determination under the Program the Administrators concerned shall be entitled to appoint one member to the Screening Board and two members to the Central Board. Such appointments shall conform to the requirements of paragraph II.G. of this Regulation.

2. Whenever an agency case is referred to the Screening or Central Boards, the Director shall notify the Administrator concerned thereof. The Administrator, or his designee, shall, in their absolute discretion, exercise or waive the right of his agency to be represented on the Board involved and shall notify the Director thereof in writing, which notification shall be made a permanent part of the record in the case. If the right is exercised, the Screening Board panel to which the case is referred shall consist of four members and the Central Board panel of five members, instead of the usual three members; if it is waived the Board shall be constituted as provided in paragraphs II.B. or II.E., above.

G. Access Authorization of Nominees

No person shall be appointed Director, board member, or staff member under this Program until such person has been granted an authorization for access to Top Secret information, or its equivalent, based on a background investigation.

III. STANDARD AND CRITERIA

A. Standard for Issuing an Access Authorization

Authorization for access to classified information of a specific classification category shall be granted or continued only if it is determined that such access by the applicant is clearly consistent with the national interest.

B. Criteria for Application of Standard in Cases Involving Individuals

1. Commission of any act of sabotage, espionage, treason, or sedition or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason or sedition.

2. Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, revolutionist, or with an espionage agent or other secret representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of Government of the United States by unconstitutional means.

3. Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of Government of the United States by unconstitutional means.

4. Membership in, or affiliation or sympathetic association with, or participation in the activities of any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, fascist, communist, or subversive, or which has adopted or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means.

5. Intentional, unauthorized disclosure to any person of classified information, or of other information, disclosure of which is prohibited by law.

6. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

7. Participation in the activities of an organization established as a front for an organization referred to in subparagraph 4., above, under circumstances indicating that his personal views were sympathetic to the subversive purposes of such organization.

8. Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purposes.

9. Sympathetic interest in totalitarian, fascist, communist, or similar subversive movements.

10. Sympathetic association with a member, or members, of an organization referred to in subparagraph 4., above.

(Ordinarily, this will not include chance or occasional meetings, nor contacts limited to normal business or official relations.)

11. Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to in subparagraphs 1. through 9., above. A close continuing association may be deemed to exist if the individual lives at the same premises as, frequently visits, or frequently communicates with such person.

12. Close continuing association of the type described in subparagraph 11., above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

13. Willful violation or disregard of security regulations.

14. Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

15. Any deliberate misrepresentations, falsifications or omission of material facts from a Personnel Security Questionnaire, Personal History Statement, or similar document.

16. Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

17. Acts of a reckless, irresponsible or wanton nature which indicate such poor judgment and instability as to suggest that the individual might disclose classified information to unauthorized persons, or otherwise assist such persons, whether deliberately or inadvertently, in activities inimical to the national interest.

18. Any illness, including any mental condition, of a nature which, in the opinion of competent medical authority, may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

19. Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may be likely to cause action contrary to the national interest.

20. The presence of a spouse, parent, brother, sister, or offspring in a nation whose interests may be inimical to the interests of the United States, or in satellites or occupied areas of

such a nation, under circumstances permitting coercion or pressure to be brought on the individual through such relatives which may be likely to cause action contrary to the national interest.

21. Refusal by the individual, without satisfactory subsequent explanation, to answer questions before a Congressional or legislative committee, or Federal or State court or other tribunal, regarding charges of his alleged disloyalty or other misconduct.

C. Guidance for the Application of the Standard and Criteria

1. The activities and associations listed in paragraph III.B., above, describe conduct which may, in the light of all the surrounding circumstances, be the basis for denying or revoking an access authorization. The conduct varies in implication, degree of seriousness and significance depending upon all the factors in a particular case. Therefore, the ultimate determination of whether an authorization should be granted or continued must be an over-all common-sense one on the basis of all the information which may properly be considered under this Regulation including but not restricted to such factors, when appropriate, as the following: the seriousness of the conduct, its implications, its recency, the motivations for it, the extent to which it was voluntary and undertaken with knowledge of the circumstances involved and, to the extent that it can be estimated and is appropriate in a particular case, the probability that it will continue in the future.

2. Legitimate labor activities shall not be considered in determining whether access authorization should be granted or continued.

3. It is essential to the efficient, economical, and equitable operation not only of the Industrial Personnel Access Authorization Review Program, but of the total procedures whereby the Department of Defense authorizes access to classified information, that applicants provide full, frank and truthful answers when they complete official questionnaires or other similar documents, or respond to official inquiries. Accordingly, the deliberate giving of false or misleading testimony or information on relevant matters, may be sufficient standing alone to justify denying or revoking access authorization and shall be weighed carefully before a determination is reached under this Program.

4. The granting or continuing of an authorization for access to a contractor is not clearly consistent with the national interest if the access authorization of an owner, officer,

director, or any executive of the contractor who is required to have such an access authorization, has not been, or would not be, granted under the standard and criteria set forth in paragraphs III.A. and III.B., above.

IV. PROCESSING OF CASES

A. Emergency Action

Department of Defense activities or agencies may not make a final determination denying or revoking an authorization for access. In exceptional cases officials authorized by the military department concerned may suspend an authorization previously granted to an individual (but not to a facility) when, in the opinion of the authorized official, the individual's continued access to classified information, pending action by the Screening Board, would constitute an immediate threat to the national interest. Any such suspension action shall be reviewed by the Screening Board to determine its propriety.

B. Forwarding Cases

Department of Defense activities or agencies shall forward to the Director all cases prescribed in paragraph I.F.1 together with the complete file, including the recommendation in the case, the reasons therefor, and all other available information and material relevant to a determination. After ensuring that the file has been properly prepared and transmitted, the Director shall forward it to the Screening Board for appropriate action.

C. Initial Adjudication Procedures (Screening Board Action)

1. The Screening Board shall review each case referred to it by the Director and shall determine in accordance with the standard and criteria set forth in paragraph III whether the reported information warrants (a) authorizing or continuing to authorize access at the specific classification category requested or (b) further processing as set forth below.

2. With respect to any case pending before it, the Screening Board may request the Director to:

   a. Request further investigation, specifying the particular points on which the Board feels its information is not adequate.

   b. Issue to the applicant such written interrogatories as the Board may deem desirable.

   c. Arrange for an interview with the applicant.

d. Arrange for an interview with any witness who has given information relevant to a decision in the case.

3. The Screening Board may, with respect to any case pending before it, determine at any time that an existing authorization shall be suspended. Upon any such determination, the Director shall notify the applicant, the contractor, the office of the cognizant military department and the agency or activity which forwarded the case to him.

4. If the Screening Board determines that access at the specific classification category requested should be granted or continued in effect, it shall prepare its determination in accordance with the instructions set out in subparagraph 9., below. The Director shall notify the agency or activity which forwarded the case to him of the determination and instruct it to effect the authorization where appropriate. The Screening Board shall reconsider its determination at the request of the Secretary of Defense, the Secretary of a military department, or the Administrator concerned.

5. If the Screening Board concludes on the basis of the information available to it and in accordance with the standard and criteria set forth in paragraph III that the case does not warrant a determination favorable to the applicant, it shall prepare a Statement of Reasons informing the applicant of the grounds upon which his access authorization may be denied or revoked. This Statement of Reasons shall be as comprehensive and detailed as the national security permits. At the time a Statement of Reasons is issued, any access authorization previously granted for Secret or Top Secret shall be suspended or limited to Confidential unless such access authorization was granted pursuant to board action under any industrial personnel review program in which case the Screening Board shall determine whether the access authorization should be suspended or limited. The Screening Board shall also determine whether any access authorization previously granted for Confidential should be suspended or limited.

6. The Director shall forward the Statement of Reasons and a copy of this Regulation to the applicant and shall inform him of the status of his access authorization pending a final determination. An applicant who has been served with a Statement of Reasons and who has filed under oath or affirmation a written reply thereto which complies with the requirements of paragraph IV.C.7 shall be afforded:

a. An opportunity to appear personally before a Field Board for the purpose of supporting his eligibility for access authorization and of presenting evidence on his own behalf.

b. A reasonable time to prepare for that appearance.

c. An opportunity to be represented by counsel without cost to the Government.

d. The opportunity to cross-examine adverse witnesses prescribed in paragraph IV.E.2.

7. Before an applicant is afforded an opportunity to make a personal appearance before a Field Board he must submit a detailed written answer under oath or affirmation specifically admitting, denying or disclaiming knowledge of each allegation and each supporting fact alleged in the Statement of Reasons. The applicant's answer must either admit or deny each allegation or supporting fact, giving such explanation as may be available to him, or disclaim knowledge thereof. A general denial or other similar answer is not sufficient. The applicant must set out his position with sufficient particularity to disclose the basis thereof, in order that the Department of Defense may determine in advance of the personal appearance proceeding whether the allegations and supporting facts are wholly denied, denied in part, or wholly admitted and make arrangements to produce such information in support as may be required. The Director may decline to accept answers which do not meet the above requirements and, upon notice to the applicant, may refuse to continue to process his application. In that event, the Director shall suspend any access authorization then in effect and give appropriate notice. In the alternative, the Director may forward the case to a Field Board which may treat allegations or supporting facts with respect to which the Director finds the answer is insufficient as established for the purpose of making a determination under this Program.

8. Where the applicant:

a. Files an answer which complies with subparagraph 7. and requests a personal appearance proceeding, or where, although the answer is insufficient, the Director elects to proceed as provided for in said subparagraph, the Director shall assign the case to a Field Board for a proceeding.

b. Files an answer which complies with subparagraph 7., but elects not to request a personal appearance proceeding, the Director shall assign the case to the Central Board for determination on the basis of all available information including the answer and all documents in support thereof.

c. Does not answer, the Director shall instruct the department which forwarded the case to deny or revoke access authorization, as appropriate, and shall advise the applicant.

9. All determinations by the Screening Board shall be made in executive session. A determination to grant or continue access authorization shall be by unanimous vote. No person other than members of the Board shall be present when the Board deliberates and reaches its determination.

10. Decisions adverse to the applicant announced by the Director in accordance with paragraph IV.C.8.c. may be reconsidered by the Screening Board at the request of the Director, or at the request of the applicant addressed through the Director, after a finding by the Screening Board that there is newly discovered evidence or that other good cause has been shown.

D. Personal Appearance

1. Promptly after being notified by the Director that a case has been referred for a personal appearance proceeding, the Chairman of the Field Board shall set a time and place for the proceeding and inform the applicant thereof. Personal appearance proceedings shall be held as soon as practicable, allowing the applicant and the Department of Defense a reasonable time to prepare. Postponements may be granted by the Chairman in his sound discretion upon application by either party with notice to the other.

2. Normally, a personal appearance proceeding shall be held at the home office of the Field Board concerned. When the applicant so requests and when in the discretion of the Chairman equity to him requires that the proceeding be held in a different place, or when the interests of the Government would be served thereby, Field Boards, subject to the over-all authority of the Director, may arrange to convene at such times and places as will best meet the above objectives.

3. It is to the advantage of both the applicant and the Department to shorten and simplify the proceedings before the Field Board by stating the issues and arriving at an agreed-upon version of the facts in the case when it is possible to do so. Department counsel is authorized to consult directly with the applicant, or if he has counsel or representative, with them, for purposes of reaching mutual agreement upon arrangements for an expeditious proceeding in the case. Such arrangements may include clarification of issues, and stipulations with respect to testimony and the contents of documents and other

physical evidence. Such stipulations when entered into shall be binding upon the applicant and the Department of Defense for the purpose of these proceedings.

4. The applicant is responsible for producing witnesses in his own behalf or presenting other evidence before the Field Board to support his reply to the Statement of Reasons. When specific assistance is requested, however, the department counsel and the Chairman of the Field Board may provide such assistance, upon a showing that it is practicable and necessary. In the Chairman's sound discretion, invitations to attend the proceeding as witnesses in the applicant's behalf, or requests for specific documents or other physical evidence, may be tendered upon application, provided a showing of the necessity for such assistance has been made.

5. Department counsel is responsible for producing at the proceeding witnesses and information relied upon by the Department to establish those facts alleged in the Statement of Reasons which have been controverted. Every reasonable and practicable effort shall be made to obtain witnesses and to facilitate their appearance in accordance with the policy set out in paragraph I.D.3. When requested all Department of Defense agencies and activities shall cooperate in carrying out this policy.

6. Where an applicant who has requested an opportunity to appear fails without sufficient reason therefore to appear at the time and place set for the proceeding, or at any postponement thereof, and has not requested that his case be determined on the basis of all available information including any written material he may have submitted, the Field Board shall return the case to the Director without further action. The Director shall then take action under paragraph IV.C.8.c.

E. Procedures for Personal Appearance Proceedings

1. General Provisions

a. Personal appearance proceedings are designed to ascertain all the relevant facts in a case to aid in reaching fair and impartial determinations. Such proceedings are not to be conducted with the formality of a court proceeding or of an administrative hearing conducted under the Administrative Procedure Act, but rather as administrative inquiries held for the purpose of affording the person concerned an opportunity to appear for the purpose of supporting his eligibility for an access authorization and to permit the Department of Defense to inquire fully into the matters related to the particular case. As

provided in paragraph IV.E.2.a., the customary rules of evidence shall not be controlling.

b. Personal appearance proceedings conducted under this Regulation are not adversary in nature. Nevertheless, a careful and searching inquiry into the facts is necessary if the objectives of this Regulation are to be effectuated. Field Boards shall be alert to the necessity for identifying and resolving disputed issues of fact whenever possible and shall make their rulings with these considerations in mind.

c. Personal appearance proceedings shall be conducted in an orderly manner and in an atmosphere of dignity and decorum. They may be attended only by the members of the Field Board, the applicant and his counsel or representatives, authorized personnel of the Department of Defense and necessary clerical personnel. Unless the Chairman of the Field Board rules otherwise, a witness may be present only when he is testifying.

d. The Director shall designate a qualified attorney to represent the Department of Defense and to act as department counsel in each case. He shall represent the Department, and shall be responsible for making a complete record and for placing before the Field Board all material which may properly be incorporated therein. He shall question Department of Defense witnesses and cross-examine witnesses produced by the applicant, although the Field Board may also question any witness.

e. After the proceeding has been convened, and the Statement of Reasons and the applicant's answer thereto have been entered into the record, normally the applicant shall have the right to make a general opening statement either in person or by counsel, and to present his case. He may call witnesses, testify in his own behalf if he so desires and present documents, or other information, in support of his application for access authorization, and cross-examine witnesses produced by the Department of Defense.

f. Witnesses before the Field Board shall testify subject to the provisions of Sec. 1001, Title 18, U.S. Code. Before testifying they shall be informed that said section makes it a criminal offense punishable by a maximum of five years imprisonment, $10,000 fine, or both, knowingly and willfully to make a false statement

or representation to any department or agency of the United States as to any matter within the jurisdiction of any department or agency of the United States. Written interrogatories must be sworn to before a notary public or other official authorized to administer oaths.

g. When appropriate the Field Board shall amend the Statement of Reasons to conform it with the information available and enter the amendment into the record. When such amendments are made, the Chairman of the Field Board shall grant the applicant such additional time as, in his sound discretion, he deems appropriate to answer such amendments and to secure and present evidence pertaining thereto.

h. The Field Board may recess the proceeding at any time at the request of the applicant or his counsel, department counsel, or upon its own motion.

i. Before the Chairman of the Field Board adjourns the proceeding, he shall ask the applicant whether he desires additional time to secure and present additional evidence or to submit a brief. If the applicant desires to present such additional material, the Field Board shall determine the time within which it must be presented and the form in which it will be received. The Chairman shall also advise the applicant that announcement of the determination in his case will be made by the Director, Office of Industrial Personnel Access Authorization Review.

j. A verbatim transcript (in triplicate) shall be made of the proceedings and such transcript shall become a permanent part of the record. The transcript shall not include information introduced in accordance with the provisions of paragraph IV.E.2.e. and f., below. The applicant or his designated representative shall be furnished without cost one copy of the transcript, less the exhibits, upon his request. The transcript shall be reviewed by the Board prior to release to ensure that it contains no classified information, nor any information which might compromise investigative sources or methods or the identity of confidential informants.

k. If the applicant or his counsel desires to submit corrections in the transcript to the Field Board, he shall note the corrections on a separate statement designating the page and line. The statement of corrections must be filed within the time set by the Field Board which shall determine what corrections are allowable, shall enter on the transcript by marginal notation the corrections which are allowed, and shall

enter on the statement filed by the applicant the corrections which are rejected. This statement shall be made a permanent part of the record. The Chairman of the Field Board in his discretion may call upon the applicant or his counsel for a discussion of the corrections. Corrections shall be allowed solely for the purpose of conforming the transcript to the actual testimony.

1. Whenever the Field Board concludes with respect to an issue of fact that the investigation is inadequate or that all of the information has not been fully developed or explored, it may request that further investigation be conducted and in appropriate cases may recess the proceeding pending such investigation. Such requests shall be addressed to the Director through the department counsel. Information developed through supplemental investigation shall be made available to the Board in the same manner as information developed in the original investigation.

2. Introduction of Information

a. The record shall consist exclusively of all information presented by the Department of Defense in accordance with this Regulation, together with all information submitted by the applicant. The record shall not be limited to evidence admissible in the courts of the United States. Any oral or documentary evidence may be received if otherwise admissible under this Regulation and accorded the weight deemed appropriate, but irrelevant, immaterial or unduly repetitious material may be excluded, in the sound discretion of the Chairman of the Field Board. Efforts shall be made to obtain the best evidence available.

b. Unless permitted by paragraphs e. and f., below, the record may contain no information adverse to the applicant on any controverted issue unless (1) the information or its substance has been made available to the applicant and he offers no objection to its presentation; or (2) the information or its substance is made available to him and the applicant is afforded an opportunity to cross-examine the person providing the information either orally or by written interrogatories. The foregoing shall not apply to information bearing upon the characterization in the Statement of Reasons of any organization or individual other than the applicant. Information the admission of which is not prohibited by this paragraph, or by any other provision of this Regulation, may be received and made part of the record and may be considered by any board or official charged with making determinations under this Regulation.

c. Prior to the referral of a case to a Field Board for a personal appearance proceeding, the Director, Office of Industrial Personnel Access Authorization Review, upon application by either the applicant or the department counsel, shall rule whether, in the light of all the circumstances, testimony shall be taken personally, by deposition, or through cross-interrogatories. In making this ruling, the Director shall exercise his sound discretion and shall state his reasons therefor. He may direct the applicant or his counsel, and department counsel to frame written interrogatories and upon application by either party shall rule upon the relevancy and materiality of any question to be incorporated therein. Once the case has been referred to the Field Board, the Chairman of the Field Board shall perform this function. Any action taken by the Director under this paragraph shall be reflected in the record where appropriate.

d. Notwithstanding any other provision of this Regulation, records compiled in the regular course of business, or other physical evidence other than investigative reports as such, may be received and considered subject to rebuttal without authenticating witnesses, provided such information has been furnished by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary of Defense or the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration to safeguard classified information within industry pursuant to Executive Order 10865. Such documents shall be exhibited to the applicant and when received by the Field Board shall be made a part of the record in the case.

e. Records compiled in the regular course of business, or other physical evidence other than investigative reports as such, relating to a controverted issue, which, because they are classified, may not be inspected by the applicant, may be received and considered provided that (1) the Secretary of Defense or when appropriate, the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration, or the Director, Office of Industrial Personnel Access Authorization Review, who has been designated as their special designee for that purpose pursuant to Section 5,(b), Executive Order 10865, has made a preliminary determination that said physical evidence appears to be material, and that failure to receive and consider it would, in view of the level of access sought, be substantially harmful to

the national security, and (2) to the extent that the national security permits, a summary or description of said physical evidence shall be made available to the applicant. In every such case, information as to the authenticity and accuracy of such physical evidence furnished by the investigative agency involved shall be considered.

f. A written or oral statement by a person adverse to the applicant on a controverted issue, and not relating to the characterization in the Statement of Reasons of any organization or individual other than the applicant, may be received and considered without affording an opportunity to cross-examine the person making the statement only in circumstances described in either of the following subparagraphs, provided however, that a summary of the statement as comprehensive and detailed as the national security permits shall be made available to the applicant:

(1) The head of the department supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his identity would be substantially harmful to the national interest.

(2) The Secretary of Defense or when appropriate, the Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration, or the Director, Office of Industrial Personnel Access Authorization Review, who has been designated as their special designee for that particular purpose pursuant to Section 4 (a),(2), of Executive Order 10865, has preliminarily determined, after considering information furnished by the investigative agency involved as to the reliability of the person and the accuracy of the statement concerned, that the statement concerned appears to be reliable and material, and has determined that failure to receive and consider such statement would, in view of the level of access sought, be substantially harmful to the national security and that the person who furnished the information cannot appear to testify (a) due to death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant, or (b) due to some other cause

determined by the Secretary or the Deputy Secretary of Defense, or when appropriate, by the Administrator or Deputy Administrator of the Federal Aviation Agency or the National Aeronautics and Space Administration to be good and sufficient.

g. A written or oral statement of a person relating to the characterization in the Statement of Reasons of any organization or individual other than the applicant may be received and considered without affording the applicant an opportunity to cross-examine the person making the statement, irrespective of whether the statement is adverse to the applicant or relates to a controverted issue, provided the applicant is given notice that it has been received and may be considered by the Board, and is informed of its contents to the extent permitted by paragraph I.D.4., above.

h. Whenever information is made a part of the record under the exceptions authorized by subparagraphs e. or f. (1) or (2), the record shall contain certificates evidencing that the determinations required therein have been made. Such certificates shall include the reasons therefor and shall be made available to the applicant unless their disclosure is prohibited by paragraph I.D.4., above.

i. In any case where information is received by the Field Board pursuant to subparagraphs e. or f. (1) or (2), a final determination adverse to the applicant in a Department of Defense case shall be made only by the Secretary of Defense, and in an agency case by the Administrator of the Federal Aviation Agency or of the National Aeronautics and Space Administration, as appropriate, based upon their personal review of the case.

F. Field Board's Report

1. As promptly as possible after the proceeding and after full consideration of the record and of any arguments made or briefs submitted, the Field Board shall prepare a report which shall include a recommended decision in the case, prepared in accordance with the standard and criteria set forth in paragraph III. The Field Board's report shall contain a recitation of the questions presented, a summary of the evidence received, findings of fact with respect to each allegation made, and its conclusion on each question presented for consideration. The Field Board's report shall be forwarded through the Director to the Central Industrial Personnel Access Authorization Board. The report shall not be made available to the applicant.

2. Whenever an applicant has made a personal appearance before a Field Board, a decision adverse to him may be made only on grounds stated in the Statement of Reasons and any amendments thereto and must be based upon a record that is in conformity with Executive Order 10865 and this Regulation. A Field Board or the Central Board may not receive or consider any information with respect to any fact in issue, unless such information is made available to such Board in accordance with this Regulation.

3. In every case where applicable, the Field Board shall give appropriate consideration to the fact that the applicant did not have the opportunity to inspect classified information or to identify or cross-examine persons constituting sources of information. It shall also give appropriate consideration to whether information was given under oath or affirmation, and whether or not the person concerned has had an opportunity to rebut it. In every case where classified physical evidence is involved, information as to the authenticity and accuracy of said physical evidence furnished by the investigative agency shall be considered.

G. Action by the Central Industrial Personnel Access Authorization Board

1. Whenever a case is referred to the Central Board, it shall make a final determination subject to the provisions of paragraph IV.I.3. in cases which do not fall within the provisions of paragraphs IV.E.2.e. or IV.E.2.f. (1) or (2), specifying the specific category of classified information to which access shall be granted or continued where appropriate.

2. In cases where the provisions of paragraphs IV.E.2.e. or IV.E.2.f. (1) or (2) apply, the Central Board shall (a) prepare a final determination where the decision is to grant or continue access at the specific classification category requested, or (b) where it concludes that access at that specific classification category is not warranted, it shall so notify the Director.

3. Before the Central Board makes a final decision, it shall take the following action, as applicable:

   a. If the Board reaches a tentative decision adverse to the applicant, it shall, through the Director, give

notice thereof to the applicant together with notice of its proposed findings for or against him with respect to each allegation in the Statement of Reasons, and shall provide him with an opportunity to make an appearance before it, in person or by counsel, or to file a written brief. Within ten (10) calendar days after his receipt of such notice, the applicant may file with the Board a written notice of intention to appear or to file a written brief. If the applicant files such written notice of intention, the Board shall fix as early a date as practicable for filing a written brief or making a personal appearance before it, and, through the Director, shall give notice thereof to both the applicant and department counsel and at the same time shall furnish department counsel with copies of the tentative decision and proposed findings as previously furnished to the applicant.

b. If the Board reaches a tentative decision favorable to the applicant it shall, through the Director, give notice thereof to the department counsel together with notice of its proposed findings for or against the applicant with respect to each allegation in the Statement of Reasons, and shall provide department counsel with an opportunity to make an appearance before it, or to file a written brief. Within ten (10) calendar days after receipt of this notice, department counsel may file with the Board a written notice of intention to appear or to file a written brief. If department counsel files such written notice of intention, the Board shall fix as early a date as practicable for filing written brief or making personal appearance before it, and, through the Director, shall give notice thereof to both department counsel and the applicant and at the same time shall furnish the applicant with copies of the tentative decision and proposed findings as previously furnished to department counsel.

c. Personal appearances before the Central Board and written briefs filed with the Central Board are intended to permit the applicant and department counsel to present their positions based exclusively upon the record made before the Field Board, and shall not be used as a substitute for proceedings before such a Board. Argument may be made, but witnesses shall not be heard and testimony shall not be taken.

d. Under a. and b., above, when the applicant or department counsel, as the case may be, has filed a written notice

of intention, the other shall be entitled at the designated time to appear personally or file a written brief as he may prefer. Failure by him to utilize this opportunity shall be deemed a waiver thereof.

e. After the applicant and department counsel have submitted written briefs or appeared before the Central Board, as provided in subparagraphs a. and b., above, the Board shall reach a final determination in all cases in which it is authorized to do so, and shall refer all other cases to the Director for action by him in accordance with paragraph H., below. If the applicant under subparagraph a., above, or department counsel under subparagraph b., above, fails to file written notice of intention, or fails, after filing such notice, to appear or file a written brief in a timely manner, the tentative decision of the Board shall automatically become final in all cases in which the Board is authorized to make a final determination and notice thereof shall be given in accordance with paragraph I., below; in all other cases the tentative decision shall be referred to the Director for action by him in accordance with paragraph H., below.

4. In reaching a determination or conclusion as hereinabove provided, the Central Board may adopt, modify or reverse the findings, conclusion, or recommendation of the Field Board, or may request further investigation or may return the case through the Director to the Field Board with instructions to take further testimony or conduct other proceedings. In each case it shall consider the matters set out in paragraph IV.F.3., above.

5. In cases in which it is authorized to reach a final determination, the Central Board shall prepare an opinion which shall include an analysis of the evidence, findings of fact and the reasoning on which the determination is based. The determination shall be reached by majority vote, shall be signed by the members, and made a permanent part of the record in the case. If a determination is not unanimous, a minority opinion shall be filed.

H. Action by the Secretary of Defense or the Administrators

Whenever a case falls within the provisions of paragraphs IV.E.2.e. or IV.E.2.f. (1) or (2), and the Central Board concludes that access at the specific classification category requested is not warranted, the Director shall forward the case to the Secretary of Defense or the Administrator of the

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Federal Aviation Agency, or the National Aeronautics and Space Administration as appropriate for determination. The determination shall include a review of any determinations made pursuant to paragraph IV.E.2.f. (2) (b) by any official other than the Secretary or the Administrator.

I. Procedure after final determinations

1. Final determinations reached by the Central Board shall be announced by the Director who shall notify the applicant of the determination in his case. Where the determination is favorable to the applicant he shall be notified only of the final conclusion reached. Where the determination is adverse to the applicant, he shall be notified of (1) the final conclusion reached, and (2) whether a finding was for or against him with respect to each allegation in the Statement of Reasons. The Director shall also give appropriate notice to the other parties concerned.

2. Final determinations reached by the Secretary of Defense or the Administrator concerned shall be announced by the Director. Where the determination is favorable to the applicant he shall be notified only of the final conclusion reached. Where the determination is adverse to the applicant, he shall be notified only of (1) the final conclusion reached and (2) whether a finding was for or against him with respect to each allegation in the Statement of Reasons. The Director shall also give appropriate notice to the other parties concerned.

3. Determinations of the Central Board shall be final subject only to:

   a. Reconsideration on its own motion, or at the request of the applicant, addressed through the Director, after it has made a finding that there is newly discovered evidence or that other good cause has been shown;

   b. Reconsideration by the Central Board at the request of the Secretary of Defense, the Secretary of any military department, the Director, or when appropriate, the Administrator concerned.

   c. Reversal by the Secretary of Defense or in agency cases reversal by the Administrator concerned after consultation with the Secretary of Defense.

J. Authority of the Secretary of Defense, and the Administrators, Federal Aviation Agency & National Aeronautics and Space Administration

Nothing contained in this Regulation shall be deemed to limit

or affect the responsibility and powers of the Secretary of Defense or of any Administrator personally, and without respect to this Regulation, to deny or revoke an access authorization in a case affecting his department or agency when he personally determines that the provisions of this Regulation cannot be invoked consistent with the national security and that the security of the nation requires such denial or revocation of access authorization. Such determination shall be conclusive.

V. MISCELLANEOUS

A. Pending Cases

All cases presently pending in the Office of Industrial Personnel Access Authorization Review or before any board constituted under any industrial personnel review program shall be processed under this Regulation unless a Statement of Reasons has been issued in the case and the applicant has been afforded a personal appearance proceeding substantially in accordance with the provisions of this Regulation.

B. Reconsideration of Prior Decisions

1. Decisions rendered under any industrial personnel review program prior to the effective date of this Regulation which denied or revoked an access authorization may be reconsidered by such boards as the Director deems appropriate at the request of the applicant, addressed through the Director, after a finding by the appropriate board that there is newly discovered evidence or that other good cause has been shown. Whenever a final determination of denial or revocation based upon a personal appearance proceeding is found to have been unauthorized at the time it was made, authority is hereby delegated to the Director, Office of Industrial Personnel Access Authorization Review, to vacate such final determination and all subsequent administrative action predicated thereon and to take such other steps as may be deemed necessary to complete reconsideration of the case.

2. In cases where an access authorization has been previously granted and a Department of Defense agency or activity receives additional derogatory information which was not considered by a board at the time it decided the case, such agency or activity, when it is of the opinion, after reviewing the complete file including the record of any prior proceedings, that revocation of said authorization is warranted, shall forward the case to the Director through appropriate channels for referral to the Screening Board in accordance with paragraph IV.B.

C. Monetary Restitution

If an applicant suffers a loss of earnings resulting directly from a suspension, revocation, or denial of his access authorization, and at a later time a final administrative determination is made that the granting to him of an access authorization at least equivalent to that which was suspended, revoked or denied, would be clearly consistent with the national interest and it is determined by the board making a final favorable determination that the administrative determination which resulted in the loss of earnings was unjustified, reimbursement of such loss of earnings may be allowed in an amount which shall not exceed the difference between the amount the applicant would have earned at the rate he was receiving on the date of suspension, revocation, or denial of his access authorization and the amount of his interim net earnings. The filing and processing of any such claim shall be in accordance with such regulations as the Secretary of Defense may prescribe after consultation with the Administrators. Payment shall be limited to claims administratively determined to be just and equitable. No applicant shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under any industrial personnel review program. Payments under this provision shall be in full satisfaction of any and all claims, of whatever nature they may be, which the applicant has or may assert against the United States, or the Department of Defense or any of its agencies or activities, or the Federal Aviation Agency, or the National Aeronautics and Space Administration, or any of them, by reason of or arising out of the suspension, revocation or denial of access authorization.

D. Effective Date

This Directive is effective immediately.

Thomas S. Gates

Secretary of Defense

Enclosure - 1
Executive Order 10865 (See App. pp. 519)

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Individuals

Organizations